Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-1006

CAROLEE BIDDY,

Petitioner,

V.

FRED DIAMOND, SHERIFF, JACKSON COUNTY JAIL, and JACK REED, WARDEN OF THE MISSISSIPPI STATE PENITENTIARY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

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EXPLICATION OR REAFFIRMATION OF *MIRANDA V. ARIZONA* BY THIS COURT IS NECESSARY TO RESOLVE THE CRITICAL LEGAL QUESTION WHETHER THE CONDUCT OF THE POLICE SUFFICIENTLY COMPORTS WITH THE *MIRANDA* WARNING REQUIREMENTS TO INSULATE PETITIONER'S CONDUCT AND ADMISSION AGAINST SUPPRESSION. THIS SECOND PETITION COMES BEFORE THIS COURT IN AN ENTIRELY DIFFERENT FACTUAL POSTURE BECAUSE OF NEW UNDISPUTED EVIDENCE THAT PETITIONER DID REQUEST HER LAWYER ON DECEMBER 15, 1970, TWELVE DAYS BEFORE THE DAMAGING STATEMENTS WERE ELICITED FROM HER BY THE POLICE OUT OF THE PRESENCE OF HER LAWYER.

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BRIEF OF PETITIONER

The petitioner, Carolee Biddy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Mississippi Supreme Court's opinions on appeal and on rehearing; the opinion of the United States District Court for the Southern District of Mississippi; and the opinion of the United States Court of Appeals for the Fifth Circuit appear in Appendices A, B, C, and D respectively. The opinion of the Supreme Court of Mississippi is reported as *Biddy v. The State*, 277 So. 2nd 115 (Miss. 1973). The opinion of the Court of

Appeals is reported as *Biddy v. Diamond*, 516 F.2d 118 (5th Cir. July 18, 1975).

JURISDICTION

The jurisdiction of this appeal is grounded in a July 18, 1975 decision of the United States Court of Appeals for the Fifth Circuit affirming a judgment of the United States District Court for the Southern District of Mississippi, and a September 8, 1975 denial of a Petition for rehearing by the United States Court of Appeals for the Fifth Circuit. An extension of time for filing the Petition for Writ of Certiorari up to and including January 15, 1976 was granted on December 1, 1975 by Lewis F. Powell, Associate Justice of the Supreme Court. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. Section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. IS *MIRANDA V. ARIZONA*, 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602 (1966), VIOLATED IN THE FOLLOWING CIRCUMSTANCES:

   A. Whether Petitioner's December 15, 1970, written waivers of her Sixth Amendment rights were vitiated in view of her request for "her lawyer" on December 15, 1970, after she signed said waivers.

   B. Whether, apart from Petitioner's request for her lawyer on December 15, 1970, the written waivers of December 15, 1970, were "stale" twelve days later on December 27, 1970, when the police induced damaging statements from her, which statements were admitted into evidence at her state trial.

   C. Whether the oral warning (not conceded by Petitioner) given to Petitioner on December 27, 1970, just prior to the taking of the damaging admissions by the police, was an effective *Miranda* warning in light of Petitioner's request for "her lawyer" on December 15, 1970.

   D. Whether *any* form of warning given on the morning of December 27, 1970, could comport with the requirements of *Miranda* when the police officer who claims to have given the warning, induces the damaging statements, after the Petitioner's attorney left the police station because of illness, and before the arrival of a second attorney known by the police to be on his way to represent Petitioner, and whether said damaging statements elicited on December 27, 1970, can be admitted against her at her state trial.

   E. Whether damaging admissions and conduct of Petitioner, induced by the police without any *Miranda* warning on the morning of December 28, 1970, after her arrest and when the police were specifically told by Petitioner's counsel that they were not to further question her can be admitted in evidence against her at her state trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . .

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution:

> Section 1 . . . nor shall any State deprive any per-

son of life, liberty, or property, without due process of law; . . .

PREFATORY STATEMENT

References to the preliminary hearing in the State proceedings will appear with the abbreviation "P. Tr."; References to the first trial will appear as "1st Tr."; References to the second trial will appear as "2d Tr."; and References to the District Court Habeas Corpus proceeding will appear as "D.C. Tr."

STATEMENT OF THE CASE

The first trial of Petitioner for the murder of her six year old stepdaughter, Mona, resulted in a mistrial. At the second trial, on September 5, 1971, Petitioner was convicted by a jury of manslaughter and sentenced to a term of twenty years in the state penitentiary where she currently is incarcerated. The Mississippi Supreme Court affirmed her conviction (Appendix A) and denied a petition for rehearing (Appendix B).

A Petition for a Writ of Certiorari was filed with this Honorable Court and was denied, as was a Petition for Rehearing. Thereafter, in January of 1974, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Southern District of Mississippi. After a lengthy evidentiary hearing, the Petition was denied; however, the Court did issue a certificate of probable cause to the United States Court of Appeals for the Fifth Circuit. An appeal taken to that court was finally denied, after a Petition for Rehearing, on September 8, 1975 (Appendix D).

During the first trial an evidentiary hearing was held outside the presence of the jury, regarding the admissibility of statements made by Petitioner to law

enforcement officers on December 27 and 28, 1970. (See Appendix E and F respectively). By stipulation, this evidentiary hearing was made a part of the record of the second trial, whereupon defense counsel orally renewed his motion to suppress the Petitioner's statements, declaring that "[t]he defendant objects to . . . the admissibility of the statement in its entirety . . ." (2d Tr. 53-54). The trial judge denied this motion, stating, "I will rule that the *Miranda* requirements have been met . . . and that the statements are admissible." (2d Tr. 55). In her motion for a new trial, Petitioner alleged that "[t]he Court erred in allowing the statement made on December 27, 1970, to be introduced in evidence, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States" (2d Tr. 1074). On appeal to the Mississippi Supreme Court, Petitioner contended that "[t]he two oral statements made by appellant were inadmissible under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States" and *Miranda v. Arizona, supra,* (Brief of Appellant to the Mississippi Supreme Court at 14-25).

Petitioner respectfully submits the following chronology with respect to the *Miranda* issues:

1. On December 3, 1970, Petitioner reported the disappearance of her six-year-old mentally retarded stepdaughter, Mona Biddy (2d Tr. 62, 73, 82, 278). Jackson Police Officers Wesley Reeves and Harry Price first talked with Petitioner at home on December 4. On December 8, Mona was found dead at the Barnett Reservoir, about thirteen miles from Petitioner's home (2d Tr. 294, 300).

2. On December 15, 1970, in the morning, the officers called Petitioner to police headquarters to identify an

article of Mona's clothing. They honored her request to have her husband present (2d Tr. 279), but then the two officers and an assistant prosecuting attorney took her to a room by herself and asked her to recite the details of the disappearance, which she did. Petitioner was then advised of her *Miranda* rights by Officer Price, signed a written waiver, and was questioned as to her involvement which she denied; the questioning then ceased (2d Tr. 280-282, 304, 339-341, 360-363). Police then told Petitioner's husband "that we thought that Mrs. Biddy was involved in the disappearance of Mona Biddy" (2d Tr. 341). Mr. Biddy was not questioned about his involvement in Mona's disappearance because, by that time, the police had focused their suspicions on Petitioner (2d Tr. 304).

3. On December 15, 1970, in the afternoon, prior to taking a polygraph test, while at the Mississippi Highway Patrol Headquarters, Petitioner signed a second written waiver of her Sixth Amendment rights in the presence of Officer Dewey Weems (D.C. Tr. 69-70).

4. During the polygraph test and after signing a written waiver, Petitioner told Officer Dewey Weems, the examiner, that *she wanted "her lawyer."* This crucial declaration that Petitioner wanted "her lawyer" is *new evidence* in this case, discovered for the *first time* in the course of Officer Weems' testimony below (D.C. Tr. 67), and corroborated by the testimony of Officer Reeves (D.C. Tr. 22). Therefore, this most significant, and now undisputed fact, could not be presented to this Honorable Court in the prior Petition for a Writ of Certiorari.

5. Officer Weems immediately stopped the polygraph test and any further questioning of Petitioner (D.C.

Tr. 67-68). Thereafter, he recorded these events in certain hand-written notes (D.C. Tr. 68). He next reported to either Officer Reeves or Officer Price that Petitioner had asked for "her lawyer" (D.C. Tr. 68). Officer Reeves was then told by Petitioner that *she wanted "her lawyer."* Again, these facts were absent from Petitioner's prior presentation to this Court.

6. The police then permitted Petitioner to leave the Highway Patrol Headquarters to go to her home (D.C. Tr. 221), but requested a further opportunity to question her. Mr. Biddy, who was accompanying his wife, told the police to arrest her or come to their home to see her (D.C. Tr. 61).

7. On December 15, 1970, not long after Petitioner returned from the Mississippi Highway Patrol Headquarters, Officers Reeves and Price met with her, her husband, and Attorney Charles Wright at the Biddy home (D.C. Tr. 81). Attorney Wright *did not permit any questioning of Petitioner*, stating ". . . this was neither the time nor place . . ." (D.C. Tr. 38). The officers departed without questioning Petitioner and without seeking Attorney Wright's permission to question her further (D.C. Tr. 38). Nor did the officers contact Attorney Wright between December 15 and December 27, 1970 (D.C. Tr. 38).

8. The next night, December 16, 1970, the two officers responded to a call from the Biddy home, where Petitioner told them of escaping in her backyard from an unknown male attacker who stabbed her in the hip (2d Tr. 284-285).

9. During the night of December 26, 1970, Officer Reeves responded to another call from the Biddy home reporting that their two-and-a-half year old daughter,

Candice, had been kidnapped, and then found in the backyard (2d Tr. 285-286).

10. Between the evening of December 15 and the morning of December 27, 1970, Petitioner did not discuss the disappearance or death of Mona Biddy with any law enforcement officer (D.C. Tr. 144). Parenthetically, Petitioner calls to the Court's attention that neither she, Attorney Wright, nor Attorney Poole were witnesses at the suppression hearing held in connection with the State Trial, but were witnesses below.

11. On December 27, 1970, Officers Reeves and Price, acting under orders of Police Chief Lavell Tullos, told Petitioner and her husband to report to the Police Department for further questioning about the disappearance and death of Mona Biddy (D.C. Tr. 85-87). This occurred after Mr. Biddy had informed the police that he and his wife were about to leave the state on a trip to Georgia (D.C. Tr. 85). The two officers had secured Mr. Biddy's promise to notify them before leaving for a visit with Mr. Biddy's father (2d Tr. 288, 309, 389). Thereafter, the officers arrived at the Biddy residence and asked the Biddys to accompany them to headquarters. Petitioner did not want to go and told the officers so (D.C. Tr. 145-146). The officers advised her she had to go to the Police Station (D.C. Tr. 146) and would have made her go if she refused (D.C. Tr. 278).

12. The Biddys then left their home with the officers. Before leaving the grounds, they encountered Mal Sims, Mr. Biddy's business partner (D.C. Tr. 27-29). Mr. Biddy told him to go to the nearest phone, call Attorney Charles Wright, and tell him to come to the Police Station "*for him and Petitioner.*" Mr. Sims called Attorney Wright and requested him to go to the jail

(D.C. Tr. 30). Officers Reeves and Price knew "that Mr. Mal Sims was going to call their (sic) *lawyer for them.*" (2d Tr. 316) (Emphasis Supplied).

13. Petitioner and her husband proceeded to the Police Station in their own car with the officers following. (D.C. Tr. 88-89).

14. Immediately upon arrival at Headquarters, Mr. Biddy told both officers that he desired Attorney Wright's presence before Petitioner was questioned, and that he (Mr. Biddy) desired to be present for any questioning (D.C. Tr. 89). The Biddys were placed in separate interrogation rooms, the police advising Mr. Biddy they wanted to talk to him first (D.C. Tr. 90). The door leading into the interrogation room area is always locked. Neither the person being interrogated nor counsel can gain entrance or exit to the room without the assistance of a police officer (D.C. Tr. 10-11). Petitioner was extremely fatigued and distraught and fell asleep while the police questioned Mr. Biddy (D.C. Tr. 98, and 148). The police officers apparently totally ignored the fact that Attorney Wright had been summoned and continued their interrogation of the Biddys.

15. Prior to ordering the Biddys to the Police Station, the police officers had spoken with Mal Sims, Mr. Biddy's business partner, and Ted E. Biddy, Mr. Biddy's father, about Petitioner's mental and emotional condition, and about having her placed under psychiatric care or committed to an institution. (Affidavit of Mal Sims, Exhibit Applicant-5 and Affidavit of Ted E. Biddy, p. 163, Vol. 1, Record on Appeal). Officer Reeves testified that about eight o'clock in the morning of December 27, 1970, the two officers met with Mr. Sims, solely "to get his opinion of what was going on";

and that Sims said Mr. Biddy's father had called Mr. Sims, expressing a desire to talk to Officer Reeves. Mr. Sims testified at the second trial that the reason the two officers gave for meeting him:

> . . . was to ask me if I'd contact Ted Biddy and talk to him about having his wife, let's say 'removed' from the house, so far as we all agreed that she obviously, or most probably, had hurt herself, and could potentially someone else . . . and they would like for me to talk to him, and get him to—I think the way it was put, *to get him from between the police and Mrs. Biddy*, and they wanted me to talk to him about trying to have her placed under some medical care . . . (2d Tr. 407-408) (Emphasis Supplied).

Mr. Sims told the detectives he would do what he could and they all agreed he would talk to Mr. Biddy's father (2d Tr. 408). Within two hours, Mr. Sims called Mr. Biddy's father, which Mr. Sims dutifully reported to Officer Reeves; Mr. Sims gave Officer Reeves Mr. Biddy's father's phone number, suggesting that Officer Reeves call him himself (2d Tr. 383, 408-409). Within an hour, Officer Reeves did call Mr. Biddy's father, informing him that though Petitioner and her husband were planning a week's visit with him, they would "probably be detained" for further questioning. According to Mr. Biddy's father, Officer Reeves stated that this was a "dangerous situation" akin to "mass murders and suicides" and that "this girl has got to have psychiatric care, either voluntarily or compulsory" (2d Tr. 310-311, 383-385).

16. Before Attorney Wright arrived at the police

station, the officers told Mr. Biddy that he had two choices: (a.) commit Petitioner to a mental hospital, or (b.) the police would hold her on a "dangerous psychotic charge" (D.C. Tr. 90-91). The officers expressed these same sentiments to Attorney Charles Wright when he arrived at the police station, and to Mr. Sims earlier on the morning of December 27 (D.C. Tr. 41, 91 and Affidavit of Mal Sims, Exhibit Applicant-5). The officers then told Mr. Biddy they suspected that his wife was involved in Mona's death; that much of what Petitioner had told Mr. Biddy about the circumstances of Mona's disappearance was untrue; that Petitioner was having an affair with her ex-husband; and that three witnesses had seen a woman matching Petitioner's description at the Main Harbor Marina on the night of December 2, 1970 (D.C. Tr. 125-126). More specifically, the officers told Mr. Biddy that the clothing store denied Petitioner's assertion that she modeled for it, raising the question of the actual source of the clothes she brought home (2d Tr. 290, 319, 393); that his wife was not going to a health studio every week as she claimed, leaving the inference that "(s)he was going somewhere (else)" (2d Tr. 290, 321, 353, 393); that "our investigation" showed that the attack Petitioner claimed on December 16, 1970 could not have happened "that way" but was "a fake"; that the stabbing was "self-inflicted" (2d Tr. 290, 320, 353, 393); and that the kidnapping of Candice was a "hoax" (2d Tr. 290, 321, 354, 394). The officers succeeded in convincing Mr. Biddy that his wife had probably faked these last two incidents (2d Tr. 290, 394). They then asserted that Petitioner was implicated in Mona's disappearance or death (2d Tr. 394), in an acknowledged effort to enlist his help in solving the case by talking with her (2d Tr.

354-355). The true significance of the above efforts to discredit Petitioner in her husband's eyes can be appreciated only in light of the officers' overall attempt to make Mr. Biddy believe that there existed a clandestine relationship between Petitioner and her ex-husband, Roy Dunn (2d Tr. 392-393).

17. Mr. Biddy, upset by the information supplied by the police, asked to be alone with his wife, but the officers would only permit conversation between husband and wife in their presence (D.C. Tr. 126).

18. Again, ignoring the fact that Attorney Wright had been summoned to represent the Biddys, the officers hurriedly attempted to conclude their interrogation of Petitioner by bringing husband and wife together in the interrogation room where Mr. Biddy had been talking with the police (D.C. Tr. 126).

19. Caught between the police telling him that his wife was a liar, and his instinctive desire to protect her, Mr. Biddy began to repeat to his wife what the officers had just told him and to question her prior to Attorney Wright's arrival (D.C. Tr. 92 and 127). Neither Petitioner nor Mr. Biddy received any type of *Miranda* warnings during this time (D.C. Tr. 127-128). Between the time that the police had their discussion with Mr. Biddy and the time he began to talk with his wife the officers never discussed with him or Petitioner the fact that Attorney Wright was not present. Moreover, Mr. Biddy and Petitioner were not asked whether they wanted Attorney Wright to be present (D.C. Tr. 92). After Mr. Biddy began to question his wife in the presence of the officers, Officer Reeves received a telephone call. He left the room for about five minutes, returned, and took Mr. Biddy to Attorney Wright

(D.C. Tr. 127-128).

20. Attorney Wright and Mr. Biddy conferred in a small room ". . . immediately outside the interrogation area or immediately inside . . . " (D.C. Tr. 130). Mr. Biddy told Attorney Wright that Petitioner needed a lawyer, and asked him to see her. He did not tell the Attorney that she was being questioned (D.C. Tr. 131-132), and Officer Reeves did not tell Attorney Wright that Petitioner was being questioned only a few feet away (D.C. Tr. 208-209).

21. Attorney Wright was told by Officer Reeves that Petitioner was dangerous to herself and other people, and that the police were going to hold her on a dangerous psychotic charge. There was no mention of a murder charge. Officer Reeves never informed the lawyer that Petitioner was being questioned at that very moment. Attorney Wright was not asked whether Petitioner would waive her right to have her lawyer present (D.C. Tr. 40-42). Officer Reeves did not take Attorney Wright to the interrogation room where Petitioner was being detained. Attorney Wright told Officer Reeves that he was ill, and that Attorney John Poole would come to Headquarters to represent Petitioner (D.C. Tr. 42-43). Attorney Wright found Mr. Biddy in an excited and nervous state, more so than the lawyer had ever seen him (D.C. Tr. 43-44).

22. After Attorney Wright departed, Mr. Biddy and Officer Reeves returned to the interrogation room where Petitioner and Officer Price had remained. Neither Mr. Biddy nor the police officers told her that her lawyer had arrived, left because of illness, or that Attorney Wright intended to call Attorney Poole (D.C. Tr. 95, 96 and 151). Neither Mr. Biddy nor Petitioner recall

either officer asking her if she "understood her rights" (D.C. Tr. 99 and 176-177). The officers did not tell Petitioner that she had a right to have Attorney Wright or any lawyer present or that she had a right to remain silent (D.C. Tr. 151). However, the officers did tell her and Mr. Biddy that if Petitioner told the truth, there would be no charges brought (D.C. Tr. 152). Mr. Biddy, prodded by the officers, continued to talk with his wife in their presence between the time Attorney Wright left and Attorney Poole arrived (D.C. Tr. 131). It was at this point in time that Petitioner began to make the December 27 statement which appears as Appendix E to this Brief. The Officers then took over the questioning of Petitioner (D.C. Tr. 133). They told her that they had always believed Mona's death was accidental; that she ought to tell them the whole story; and that there would be no charges brought against her. She believed the police and made the damaging statement in issue, revealing a series of hoaxes perpetrated by her after finding her stepdaughter dead in bed, a few hours following the child's ingestion of a poisonous lye Liquid Plum'r. Petitioner steadfastly denied killing the child, maintaining that the death was accidental (D.C. Tr. 98, 1-3, 151-152 and 175-178).

23. Neither Mr. Biddy nor Petitioner recall that Mr. Biddy read her the *Miranda* warnings after she gave her oral statement around noon on December 27, 1970 (D.C. Tr. 93-94 and 152). The circumstances surrounding the taking of the statement are the following: (a) Petitioner, who had slept no more than two hours the night before, had been kept in a small room for over an hour while the detectives spoke with her husband (2d Tr. 318, 388, 396); (b) the detectives knew that Petitioner had a history of "mental problems", having undergone four weeks of shock treatment at an institution whose psychiatrist recommended a legal abortion because of these problems (2d Tr. 313, 465); (c) Petitioner had undergone treatment for emotional problems during three weeks preceding December 27, 1970 by four different doctors (Said treatment included prescription of tranquilizers) (2d Tr. 386-388); (d) Petitioner, whose questioning on December 15 was terminated because she was crying (2d Tr. 341, 364), was described by her husband as being in a dazed and hysterical state on December 27 and, by a detective, as crying sufficiently to make her eyes swollen (2d Tr. 333, 396-397, 400, 403).

24. Attorney Poole then arrived at the Police Station in a jump-suit, as it was the weekend (D.C. Tr. 5). He conferred with the Biddys for about thirty minutes (D.C. Tr. 8). Learning of the events which had transpired between his arrival and Attorney Wright's departure, *he told both officers that he did not want Petitioner to make any further statements, oral or written* (D.C. Tr. 7-8). He told her not to make any further statements to the police officers, told the officers he would return in the morning, and departed with Mr. Biddy (D.C. Tr. 7-8).

25. Attorney Poole, accompanied by Mr. Biddy, immediately went to Chief of Police Lavell Tullos' office, to inquire if Petitioner would be charged. The conference with the Chief was inconclusive (D.C. Tr. 9). After Attorney Poole departed, Petitioner was charged with murder.

26. During the evening of December 27, 1970, the same police officers who had questioned her earlier that

day and who had been told *specifically* by Attorney Poole not to seek any further statements from Petitioner, went to her cell; asked if she wanted food; *attempted to have her sign a written statement;* told her that their heads had been on the chopping blocks for weeks over the case; told her that they could get her out of jail and that Attorney Poole could not; advised her that she did not need a lawyer if she was telling the truth; and, upon her refusal to sign the statement, hurriedly returned her to her cell (D.C. Tr. 154-157).

27. On December 28, 1970, very early in the morning, the two police officers who had taken the oral statement on December 27, and had sought unsuccessfully to elicit a written statement that evening, again ignored Attorney Poole's specific instructions not to question his client and *knowing full well that her lawyer would soon arrive* at the Police Station, took Petitioner from her cell to the reservoir where Mona's body was found (D.C. Tr. 157-161). It is clear and undisputed from the testimony below that no *Miranda* warnings in any form were given Petitioner (D.C. Tr. 159, 254). While traveling to or from the reservoir, Officer Reeves again impugned Attorney Poole by stating that his last client had been sentenced to 45 years and that the Attorney did not spend more time with Petitioner because he was in a hurry to get back to the football game (D.C. Tr. 162). While on the trip to the reservoir, Petitioner made certain statements and did certain acts which were admitted in evidence against her (See Appendix F).

28. Upon the return of the officers and Petitioner to the jail, Attorney Poole and Ted Biddy were waiting to see her (D.C. Tr. 12-13).

REASONS FOR GRANTING THE WRIT

EXPLICATION OR REAFFIRMATION OF *MIRANDA V. ARIZONA* BY THIS COURT IS NECESSARY TO RESOLVE THE CRITICAL LEGAL QUESTION WHETHER THE CONDUCT OF THE POLICE SUFFICIENTLY COMPORTS WITH THE *MIRANDA* WARNING REQUIREMENTS TO INSULATE PETITIONER'S CONDUCT AND ADMISSION AGAINST SUPPRESSION. THIS SECOND PETITION COMES BEFORE THIS HONORABLE COURT IN AN ENTIRELY DIFFERENT FACTUAL POSTURE BECAUSE OF NEW UNDISPUTED EVIDENCE THAT PETITIONER DID REQUEST HER LAWYER ON DECEMBER 15, 1970, TWELVE DAYS BEFORE THE DAMAGING STATEMENTS WERE ELICITED FROM HER BY THE POLICE OUT OF THE PRESENCE OF HER LAWYER.

A. WHETHER PETITIONER'S DECEMBER 15, 1970, WRITTEN WAIVERS OF HER SIXTH AMENDMENT RIGHTS WERE VITIATED IN VIEW OF HER REQUEST FOR "HER LAWYER" AFTER SHE SIGNED SAID WAIVERS.

It has never been disputed that Petitioner signed two written waivers on December 15. The question simply put is whether the waivers were rendered null and void when, on December 15, she requested "*her lawyer*" after signing the second waiver. This crucial evidence did not surface during the suppression hearing held in the first state trial and incorporated by stipulation in the second trial. Petitioner's December 15 request for counsel, strangely absent from the record of this case prior to the evidentiary hearing in the District Court, now is undisputed (D.C. Tr. 67, 142, 221,

and 276). In this new factual posture, it becomes important to emphasize that the Mississippi Supreme Court, on Petition for Rehearing, by Justice Inzer, stated four times in a three and one-half page decision that *there was no evidence in the record before them that Petitioner had requested counsel:*

> After a careful search of the record, we find that *nowhere in this record* does Mrs. Biddy, the Appellant, request, indicate, hint or express a desire to speak with or consult an attorney; although she was well aware that an attorney was available. *Nowhere in any shape, form or fashion does she express a desire to have an attorney present* during any questioning, nor does her husband express any wish or desire to have an attorney present.
>
> . . .
>
> *She never at any time expressed any desire to speak with or consult with the attorney with whom her husband conferred.* Neither did she express any desire to consult with any other attorney or have an attorney present before she made any statement. A statement made under these circumstances certainly should be and is admissible in evidence. (Appendix B, p. 2b and 4b) (Emphasis Supplied).

Such language compels the recognition that the new evidence that Petitioner did indeed request "her lawyer" on December 15 gives an entirely new factual and legal posture to this case. The Court of Appeals at 121 concluded that the point herein presented ". . . would not control the outcome of this appeal." Petitioner contends that it does because if the December 15 waivers were vitiated by her undisputed request for counsel, then the *complete Miranda* warning process *must* be repeated when the police next questioned Petitioner on December 27. Petitioner's position is strengthened by

the 12-day hiatus between the interrogations and by her emotional condition on December 27. It is submitted that the request for counsel on December 15 placed a heavy constitutional burden on the police officers to give a full *Miranda* warning, and, at the very least, the "right to counsel" admonition, on December 27. At best, (and not conceded) Petitioner was asked *only* "whether she remembered her rights." In holding that such a warning, in the factual context of this case, meets the *Miranda* criteria the Court of Appeals for the Fifth Circuit virtually rendered that decision a nullity. Surely, the additional few moments required to give full *Miranda* warnings on December 27 militate in favor of Petitioner's position. The police conduct complained of easily leads to a conclusion that the officers, perceiving the opportunity to overreach Petitioner, succeeded in capitalizing on the weak warning (not conceded) to circumvent her prior request for her lawyer. This, coupled with the conduct of police hereinafter set forth, clearly demonstrates a conscious effort to violate Petitioner's right to counsel. Such police conduct should not be permitted by this Honorable Court.

Petitioner respectfully submits that the fact that the police officers did not testify at the state trial that she had requested "her lawyer" on December 15, but have testified in the District Court that such a request was made, raises serious questions bearing on the good faith, reliability and credibility of their entire testimony.

At the District Court hearing, Dewey Weems of the Mississippi Highway Patrol was a witness for Petitioner. He testified he told either Officer Reeves or

Price that Petitioner requested her lawyer on December 15 (D.C. Tr. 68). Yet at the state trials, Officer Reeves could not recall Petitioner's request for "her lawyer." And as late as the evidentiary hearing below, April 11, 1974, he was having difficulty recalling Officer Weems informing him of Petitioner's request:

Q. Did you on the same day that that waiver was signed learn that Mrs. Biddy had asked for her lawyer?
A. At a later time, yes, sir.
Q. On that day?
A. On another occasion.
Q. At the highway patrol?
A. Yes, sir.
Q. You learned that the polygraph test had been stopped because she made that request, right?
A. I didn't at that time, all I knew was she said I want a lawyer and my husband, and we let her go.
Q. Well, didn't Detective Weems tell you that he had stopped the test, shorted its completion because she made that statement?
A. Not at that time, possibly later after they had gone home. I don't remember that, no sir.
Q. Did you to this day remember him telling you that she had made that request to him and it caused him to stop the test?
A. I can't remember it, he could have but I don't remember it.
Q. But you do know of your own personal knowledge that she made that request to you or within your earshot?
A. Yes, sir.
(D.C. Tr. 220-221).

Furthermore, a comparison of Officer Price's testimony, with reference to December 15, raises a serious

question as to his credibility:

Q. Did she at any time request of you to stop talking to her?
A. No, she didn't.
Q. Did she at *any time* tell you that *she wanted her attorney or any attorney?*
A. No, sir.

(2d Tr. 342) (Emphasis Supplied).

Yet on April 11, 1974, almost three years after the first trial, Officer Price bluntly stated:

Q. Did she ask for *an attorney* on that date? [December 15].
A. *Yes, sir.*
(D.C. Tr. 275-276) (Emphasis Supplied).

As experienced police officers, testifying at a trial where the central issue concerns Petitioner's inviolate right to counsel, it is indefensible that both officers, offered repeated opportunities to tell the state trial judge that Appellant had requested her lawyer on December 15, 1970, chose to withhold that fact until she was convicted; lost her state appeal; and learned that her Petition for Writ of Certiorari to the United States Supreme Court had been denied. Petitioner respectfully submits that had the request for her lawyer on December 15, 1970, been a part of the state trial record, the whole outcome of those proceedings of nearly three years ago would have been different.

Before the Habeas Corpus Petition was filed, the issue was: Whether *Miranda* is violated when police induce damaging admissions after an attorney left the police station because of illness, and before the arrival of a second attorney known by police to be on his way to see Petitioner. Now the issue before this Court is:

Whether *Miranda* warnings and subsequent waivers are totally nullified by a subsequent request for her attorney *by Petitioner herself* as well as on her behalf by her husband? Obviously, if a waiver is nullified by subsequent requests for an attorney, then inculpatory statements obtained twelve days after the nullified waiver, without administering new *Miranda* warnings are inadmissible.

Miranda itself contains the answer to this new issue:

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning* . . .
>
> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual *must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.* (Emphasis Supplied).

Miranda v. Arizona, supra, at 444-45, 474.

On December 15 *Miranda* warnings have been given, waivers obtained and questioning is proceeding pursuant to those waivers. Then Petitioner makes a request for counsel which nullifies those warnings and waivers and on December 27 "there can be no questioning . . . the interrogation must cease until an attorney is present."

B. WHETHER, APART FROM PETITIONER'S REQUEST FOR "HER LAWYER" ON DECEMBER 15, 1970, THE WRITTEN WAIVERS OF DECEMBER 15, 1970, WERE "STALE" TWELVE DAYS LATER ON DECEMBER 27, 1970, WHEN THE POLICE INDUCED DAMAGING STATEMENTS FROM HER, WHICH

STATEMENTS WERE ADMITTED INTO EVIDENCE AT HER STATE TRIAL.

In *Brown v. State*, 252 A. 2d 272 (Md. 1969), the accused was interrogated and waived his *Miranda* rights one night and the next day was interrogated anew without a new warning. Holding the subsequent confession inadmissible, the Court stated that among the factors to be considered was whether the second interrogation was by "the same officer, or in the same place, or were close together in point of time . . ." Petitioner's case involves, not a one day but a twelve day hiatus, with no intervening interrogation.

The time periods tolerated have not even approached the instant twelve-day lapse. See *Maguire v. United States*, 396 F.2d 327 (9th Cir., 1968) (three days); *State v. Magee*, 245 A.2d 339 (N.J., 1968) (two and one-half days). The general rule, therefore, seems to be that "(q)uestioning may be interrupted for brief periods without having to give warnings anew . . . as long as the delay is not long enough to convert the matter into a separate transaction entirely." George, Jr., *Defending Criminal Cases* '(PLI, 1969), at 161. Whether earlier warnings are sufficient for a later interrogation can only be determined by a case-by-case inquiry. *People v. Bynum*, 483 P.2d 1193 (Cal. 1971). In *Nettles v. State*, 248 So.2d 259 (Fla. 1971), the Court commented that if *Miranda* warnings are necessary, a warning given six days before a confession would *not* be sufficient. And, speaking broadly, the Court in *People v. Schenck*, 101 Cal. R. 75 (1972), stated that "where substantial intervals of time occur between the initial warning and the succeeding interrogation," a new warning may be required. Similarly, in *Franklin v. State*, 252 A.2d 487 (Md. 1969), the accused was

warned of his rights on September 4 and interrogated on September 5 and 6 without renewed warnings. The Court held a confession made on the final day inadmissible: "proof showing only that the *Miranda* warnings were given on September 4 would fall short of compliance with the dictates of the *Miranda* decision."

Even if Petitioner's waiver did not turn "stale," the *Miranda* warnings themselves lost effectiveness over the twelve-day interval between the December 15 warning and the December 27 interrogation and admissions. Petitioner respectfully contends that application of existing law demonstrates that the delay between interrogations required a new *Miranda* warning on December 27.

C. WHETHER THE ORAL WARNING (NOT CONCEDED BY PETITIONER) GIVEN TO PETITIONER ON DECEMBER 27, 1970, JUST PRIOR TO THE TAKING OF THE DAMAGING ADMISSIONS BY THE POLICE, WAS AN EFFECTIVE *MIRANDA* WARNING IN LIGHT OF PETITIONER'S REQUEST FOR "HER LAWYER" ON DECEMBER 15, 1970.

There is a critical factual dispute in the record below whether, on December 27, Petitioner was asked by Officer Reeves, in the presence of Officer Price, just prior to her making the damaging statement, but before Attorney Poole arrived at the police station, "Do you remember and understand the rights that we have given you before?" (D.C. Tr. 206). Officer Reeves gives the following District Court testimony on this point:

Q. Excuse me. Who wanted to talk to him? (Mr. Biddy)
A. Mr. Wright —

Q. Wanted to talk to Ted Biddy?
A. Right. *And while they were talking I went back in the room with Mrs. Biddy and Lt. Price*, and I told Mrs. Biddy, I said there's a possibility that we'll want to talk to you a little later. *Do you remember and understand the rights that we have given you before?*
Q. What did she say?
A. She said yes, I do.

(D.C. Tr. 206-207) (Emphasis Supplied).

It is indeed significant that Officer Reeves made this inquiry during the few minutes that Mr. Biddy had left the room to confer with Mr. Wright. Perhaps, if Mr. Biddy had been present at that moment, he himself would have stopped the questioning. Indeed, Officer Reeves stated below:

Q. All right. Now, when you learned that the counsel who would initially been called by the Biddys' was sick and a replacement was on the way did you consider waiting until after he arrived before proceeding?
A. No, sir. But I did tell Mrs. Biddy, asked her if she remembered her rights and understood them, and she said she did.
Q. And you accepted that?
A. Yes, sir.
Q. You didn't take the couple of minutes it would have taken to re-read them?
A. No, sir.

This is just a further example of how the officers took advantage of Petitioner and her husband between the departure of Attorney Wright and the arrival of Attorney Poole. Petitioner has no recollection of this meager effort, if there was one, to ascertain whether she "understood the rights . . ." (D.C. Tr. 151-152,

176-177). Further aggravating the situation is the fact that both officers admit they did not tell her of Attorney Wright's arrival, which information would have been far more valuable and much less vague than the statement "Do you . . . understand the rights. . . ." Officer Price summed it up below when he said:

> She wasn't given the *Miranda* warning. She was asked 'Do you understand your rights', but she was never given the *Miranda* warning on this date (December 27, 1970). (D.C. Tr. 280).

Petitioner respectfully submits that since her request for her lawyer on December 15 nullified the earlier warnings and waivers, as if they never happened, questioning could not be resumed twelve days later on December 27 without giving a full *Miranda* warning. Otherwise, in view of her request for her lawyer, the police would be questioning Petitioner with *no Miranda* warning, which is precisely what they did on December 27. Hence, the only issue, assuming arguendo that Officer Reeves asked Petitioner if she understood her rights, is whether such a statement is a sufficient *Miranda* warning from which to infer another waiver of the right to counsel. This Court has already answered that in the negative holding that: "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Miranda v. Arizona*, *supra* at 470.

That a waiver, once made, can be withdrawn at any time is hornbook law. *Stevens v. Marks*, 383 U.S. 234, 243 (1966); 2 Han. Civ. Rts.—Civ. Lib. L.R. 144, 153 (1966); and 42 Notre Dame Lawyer 479-89. In *United States v. Crisp*, 435 F.2d 354 (7th Cir. 1970), the accused signed a waiver of rights and then merely said that he

did not want to discuss the crime of bank robbery. The Court held that later conversations—admittedly not concerned with that bank robbery—were inadmissible.

It is equally clear that requesting an attorney is as effective a withdrawal and nullification of previous waiver as a verbatim invocation of the Fifth Amendment would be. Requesting an attorney must be regarded as at least a "change of mind" concerning the earlier waiver. Cf. *People v. Pervin*, 55 Cal. R. 847 (1967). Therefore, once an attorney has been called all interrogation must cease as if the defendant had explicitly reasserted his unwillingness to talk. *People v. Paulin*, 308 N.Y.S. 2d 883, *aff'd*, 255 N.E. 2d 164 (1969); *People v. Randall*, 464 P.2d 114 (Cal. 1970); *People v. Ireland*, 450 P.2d 580 (Cal. 1959).

> If at any time the suspect indicates 'in any manner' that he wishes to remain silent or that he wishes to consult with an attorney before speaking to police, there must be no further questioning, *even if an earlier waiver was validly obtained.*

Waiver of Rights in Police Interrogations, 36 Chicago L.R. 413, 419 (1969) (Emphasis Supplied).

In *Pierce v. State*, 451 S.W.2d 219 (Ark. 1970), the accused signed a waiver and then immediately called his attorney. The Court, noting that "the accused has an unqualified right to stop the questioning at any stage and request that he be permitted to consult with an attorney," held the subsequent confession inadmissible.

> *Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible . . .*

> If such a request is disregarded and the questioning proceeds, any statements taken thereafter cannot be a result of waiver but must be presumed a product of compulsion, subtle or otherwise.

United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969) (Emphasis Added). Any admission following a request for an attorney is inadmissible because such a request withdraws and nullifies any previous waiver.

> *A valid waiver ceases to be effective whenever the accused indicates in any manner that he wishes to remain silent or that he wants an attorney.*

Frazier v. United States, 419 F.2d 1161, 1166 (D.C. Cir. 1969) (Emphasis Supplied).

D. WHETHER ANY FORM OF WARNING GIVEN ON THE MORNING OF DECEMBER 27, 1970, COULD COMPORT WITH THE REQUIREMENTS OF *MIRANDA* WHEN THE POLICE OFFICER WHO CLAIMS TO HAVE GIVEN THE WARNING, INDUCES THE DAMAGING STATEMENTS AFTER THE PETITIONER'S ATTORNEY (OBTAINED FOR PETITIONER BY HER HUSBAND) LEFT THE POLICE STATION BECAUSE OF HIS ILLNESS, AND BEFORE THE ARRIVAL OF A SECOND ATTORNEY KNOWN BY POLICE TO BE ON HIS WAY TO REPRESENT PETITIONER, AND WHETHER SAID DAMAGING STATEMENTS ELICITED ON DECEMBER 27, 1970, CAN BE ADMITTED AGAINST HER AT HER STATE TRIAL.

The State has a heavy burden of showing that on December 27, 1970, Petitioner waived her constitutional right to counsel she requested on December 15 and which request was reiterated by her husband on December 27. This Honorable Court has set a high

standard which the Respondents must here meet.

> If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy* burden rests on the government to demonstrate that the defendant *knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.* . . . This Court has always set high standards of proof for the waiver of constitutional rights . . . and reasserts these standards as applied to in-custody interrogation . . .
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. *But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.* . . .
>
> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.
>
> (Emphasis Supplied).

Miranda v. Arizona, supra, at 475

Nor can the State be heard to argue that after conviction it is the accused who bears the burden. In the Habeas Corpus proceeding, Petitioner has proffered evidence that she requested "her lawyer", a fact now admitted by the States' witnesses, police officers, who at the state trial denied what they now admit. In *Sullins v. United States*, 389 F.2d 985, 988 (10th Cir. 1968), the accused admitted having been given repeated *Miranda* warnings but asserted they requested counsel.

Law enforcement officers denied that any accused ever requested counsel but admitted that "at no time had any one of the four expressly said that he or she did not want to consult a lawyer before making a statement." Noting that the Government's heavy burden to show waiver cannot be discharged by presuming waiver from failure to ask for counsel, the Court held at 988 that:

> The testimony of the officers that none of the accused specifically declined consultation with a lawyer before answering questions is fatal to the admissibility of their inculpatory statements.

Somewhat analogous to the instant case is *United States v. Slaughter*, 366 F.2d 833 (4th Cir. 1966). Slaughter was arrested May 25, 1962, and warned of his rights, including his right to counsel. Slaughter did not then request a lawyer. Later that day two FBI agents arrived and advised him of his rights, including his right to counsel whereupon Slaughter made various statements before indicating his desire to cease answering and the interrogation stopped. On May 28, 1962, the United States Commissioner advised Slaughter of his rights, including his right to counsel. Slaughter stated ". . . that either he had an attorney who was not present, or that he knew of an attorney that he could get, and the hearing was adjourned." *Slaughter, supra*, at 837. Slaughter testified that later that day an FBI agent questioned him but he declined to make any statement. The next day, May 29, before Slaughter obtained counsel, two FBI agents interviewed him after reciting his rights, and during this interview Slaughter made statements which were later admitted into evidence. The Court, reversing and remanding for a new trial, framed the issue:

> What, then, is the significance of an expressed

> desire for counsel, followed by the taking, at the instance of the police, of incriminatory statements, preceded by a recitation of Appellant's formal rights, after expression of the desire for counsel, but before counsel had been obtained?

Slaughter, supra, at 839.

Factually, *Slaughter* is remarkably similar to Petitioner's case. In *Slaughter*, as in the case at bar, counsel had been requested. In Slaughter, a full warning of his rights (pre-*Miranda*) was then administered, whereas here no *Miranda* warning was given on December 27. In *Slaughter*, counsel was not present because not yet obtained; in the instant case counsel was not present because the damaging statement was taken, as the police well knew, between the time the sick lawyer left and his replacement arrived at the police station (D.C. Tr. 323). Finally, *Slaughter* is pre-*Miranda; Miranda* applies in full force to the instant appeal.

Even in the absence of *Miranda*, the Fourth Circuit declared at 841:

> Even if we disbelieve Appellant's assigned reason why he thereafter permitted himself to be interrogated, there is nothing in this record to support an *express change of mind on Appellant's part of his desire to consult counsel*, and a departure from his previously announced desire to exercise his right should not be lightly inferred. A statement that Appellant had a right to remain silent, on the facts here, was insufficient to overcome the respect to which his expressed desire to consult counsel was entitled. This statement here followed by a response to interrogation with nothing more, is insufficient to form a basis for waiver. (Emphasis Supplied).

According to *Slaughter*, once counsel has been requested, a mere warning of right to silence is "insuf-

ficient to form a basis for waiver." Likewise once Petitioner requested counsel on December 15 and had the request reiterated by her husband on December 27, the statement "Do you understand your rights?" is clearly insufficient to form a basis for waiver, particularly when the officers knew her lawyer had departed because of illness and a second lawyer had been summoned. Under these circumstances Petitioner was entitled to have counsel present during her interrogation.

It is axiomatic that the arguments advanced in this section and Section "C" assume that Petitioner was "in custody" on December 27, 1970. Respondents, in the District Court, for the first time in the history of this case, contended that Petitioner was not *in custody* on December 27. Such a contention is obviously frivolous and was not found to be controlling by the Court of Appeals.

However, anticipating that Respondents will assert that Petitioner was not in custody on December 27, 1970, the following is respectfully submitted.

The record below makes clear that Petitioner was indeed in custody on December 27, 1970. She was taken to the police station against her will, after advising the officers of her intent to leave the state to visit relatives (D.C. Tr. 85, 145-146). She was taken to the interrogation room area on the third floor where the door was *always* locked. Moreover, neither the person being interrogated or counsel can gain entrance to the room without the assistance of a police officer (D.C. Tr. 10-11).

The District Court made inquiry on this subject during Officer Reeves' direct testimony:

BY THE COURT:

When a person is inside this room and you leave the room, I understand nobody can go back in there without a key from the outside. But, my question is whether or not anyore on the inside can leave the room without a key?

BY THE WITNESS:

No, sir. Now, they can leave the room but they can't leave the hall.

(D.C. Tr. 208).

Petitioner submits that the state of mind of Officer Reeves on this subject is revealed by the testimony elicited below on cross-examination:

A. I told her I would like for her to go.
Q. Did you know that you had no legal right to compel her to go, short of arresting her?
A. Yes, sir.
Q. Did you explain to her it is not necessary for you to come, it is simply my desire as a policeman. Did you make that statement?
A. No, sir.
Q. Did you leave her in your own mind with the impression that it was necessary for her to come?
A. No, sir.
Q. Then why didn't you tell her that it was not when she asked you that question?
A. She didn't ask me did she have to go.

(D.C. Tr. 229).

Officer Reeves then described the physical constraints on Petitioner after her arrival at the police station:

Q. And the door was locked leading out to the hall?
A. The hall door was locked, not the room door.
Q. Well, you couldn't get out of the hall without a key, could you? You had locked it when you

came in on that Sunday afternoon, hadn't you?
A. It was locked on the night before.

(D.C. Tr. 242-243).

Finally, Officer Price, testifying on direct examination below, admits that Petitioner was indeed taken into custody on December 27, 1970:

Q. Why did you request that they go to headquarters, why didn't you talk to them at their house?
A. This is a standard procedure of ours, that we like to talk to witnesses and defendants at our headquarters which is a good idea.
Q. Was she under arrest at that time?
A. No, sir.
Q. *What would have happened if she had refused to go?*
A. Well, she would've been made to go.

(D.C. Tr. 278) (Emphasis Supplied).

It is generally recognized in a *Miranda* context that interference with liberty, not formal arrest, triggers *Miranda* rights:

> A person 'detained' by the police in the field may not be 'free to go.' If only 'formal arrest' constituted 'custody' the police could frustrate *Miranda's* protective devices by 'detaining'; and thus delaying formal arrest.

Windsor v. United States, 389 F.2d 530, 534 (5th Cir. 1968). Clearly on December 27 and 28, Mrs. Biddy was detained and not free to go.

E. WHETHER DAMAGING ADMISSIONS AND CONDUCT OF PETITIONER, INDUCED BY THE POLICE WITHOUT ANY *MIRANDA* WARNING ON THE MORNING OF DECEMBER 28, 1970, AFTER HER ARREST AND

WHEN THE POLICE WERE SPECIFICALLY TOLD BY PETITIONER'S COUNSEL THAT THEY WERE NOT TO FURTHER QUESTION HER, CAN BE ADMITTED IN EVIDENCE AGAINST HER AT HER STATE TRIAL.

On December 28, the police, knowing full well that Attorney Poole was coming to see Petitioner that morning, but without mentioning that fact to her, induced her to guide them to the reservoir location where the body was placed, which conduct and accompanying admissions were admitted into evidence (See Appendix F).

Before the Habeas Corpus proceeding, the record reflected only that on December 27 Attorney Poole told Detectives Reeves and Price that he did not want Petitioner to sign any statements. However, according to the District Court testimony of Attorney Poole, he not only proscribed signing anything, but told both Petitioner and the officers on December 27 that she was not to make *any* further statements (D.C. Tr. 7-8). Before the proceeding below the record reflected that the police demeaned Attorney Poole to Petitioner only on the morning of December 28, but testimony adduced from Petitioner now indicates that this process of subversion of trust in counsel was begun by police the night before (D.C. Tr. 154-157) and carried over to the morning of December 28 (D.C. Tr. 162).

The Court of Appeals found Petitioner's conduct on December 28 "voluntary," commenting at 123 that: "She insisted that this is what she wanted to do." Petitioner would take issue with this finding. On the morning of December 28, it is undisputed that the officers knew Attorney Poole had stated he would return

at 9:00 A.M. (a fact not mentioned in the opinion below) (D.C. Tr. 7-8). Yet, without advising the lawyer of their desire to interview Petitioner, and in the face of the attorney's direction that they not talk with her (a critical fact again not mentioned in the opinion below) (D.C. Tr. 7-8), she was guided into a police car after receiving promises of help (D.C. Tr. 182). Surely, this type of police activity falls within the conduct proscribed by *Miranda, supra.* If Petitioner agreed at all to go to the reservoir, it was only after her will was overborne by the officers. The bad faith of the police is amply demonstrated by their endeavor to impugn the integrity and competency of Attorney Poole (D.C. Tr. 154-157, 162). This uncalled for attack on Petitioner's lawyer was also overlooked in the opinion below. This caliber of conduct, clearly designed to destroy Petitioner's trust in her counsel, is contrary to the spirit of the Fifth and Sixth Amendments to the United States Constitution and to *Miranda, supra,* and its progeny.

For example, in *United States v. Wedra,* 343 F. Supp. 1183 (S.D. N.Y. 1962), Wedra was, on April 10, indicted, arrested and given the *Miranda* warning by a federal agent who was informed by Wedra's attorney that Wedra was not to be questioned without the attorney being present. Around 1:00 a.m., April 11, as the attorney left his client in custody, he advised him not to answer questions and advised federal agent Lepore that he did not want Wedra questioned in his absence. About ten minutes later, federal agent Pohl appeared and Lepore advised him that the attorney had advised his client not to answer any questions. Agent Pohl administered the *Miranda* warning and asked whether Wedra cared to make any statement, to which Wedra replied in the negative. Pohl then questioned Wedra,

eliciting the statements in question.

The Court held that once counsel has been retained and is known to the interrogators, the right to have him present does not depend upon the accused's demand for his presence, where the interrogators have been advised and they have agreed that the accused will not be questioned in the absence of counsel. "The failure of the authorities to call defendant's attorney was tantamount to a denial of a request by defendant for his attorney as articulated by the attorney." *Wedra, supra,* at 1187. Accordingly, the Court found that the Government failed to sustain its burden of proving waiver of right to counsel. The Court also declared it would suppress the statement upon the completely distinct ground of the Court's supervisory power over the administration of justice. The Court noted that the questioning took place under "deceptive auspices," including *inter alia* the fact that Lepore "knew defendant had been advised not to answer questions except in the presence of his counsel; . . . he knew of the attorney's request that if there were to be any questioning the attorney was available. . . ." *Wedra, supra* at 1188.

The instant case is an analogous one in that Attorney Poole, on December 27, made it clear, both to Petitioner and to police, that she was to make no further statement and that he would return in the morning. That night, police belittled Attorney Poole in the eyes of his client. The only mention of Attorney Poole by police the next morning was a continuation of the process of demeaning him in her view. Without mentioning to Petitioner his statement to them that she was to make no further statement and without mentioning that he was on his way to see her that morning, the police

induced her to guide them to the incriminating spot at the reservoir, at which time she again made damaging statements (See Appendix F). All this was accomplished before Attorney Poole arrived to see Petitioner. The comment of the *Wedra* Court, *supra*, at 1188-89 is appropriate here:

> The totality of this conduct was unfair and overreaching, and the government should not be the beneficiary thereof . . .
>
> The only effective way to terminate this unfair and at times unethical practice is to prohibit the government from using its illicit fruits.

Clearly, the December 28, 1970, damaging statements and conduct of Petitioner were improperly admitted into evidence.

Viewed cumulatively, the police conduct of December 27 and 28, 1970 as heretofore set forth, should not be condoned if *Miranda v. Arizona*, *supra*, is to have continued viability and afford defendants the Constitutional guarantees safeguarded by its holding.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing Petitioner's Brief upon Karen Gilfoy, Assistant Attorney General, P. O. Box 220, Jackson, Mississippi 39205, by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereto.

This the 13th day of January, 1976.

MARK J. KADISH
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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,095
No. 47,100
MRS. CAROLEE BIDDY
v.
STATE OF MISSISSIPPI
[January 8, 1973]

ROBERTSON, *Justice:*

Mrs. Carolee Biddy was indicted by the Hinds County Circuit Court Grand Jury for the murder of her 6-year-old stepdaughter, Mona Biddy. A change of venue was granted to the Circuit Court of Jackson County, where appellant was tried for murder, but convicted of manslaughter by a Jackson County Petit Jury. She was sentenced to serve a term of 20 years in the State Penitentiary.

About 7:55 A.M. on December 3, 1970, appellant called the Jackson Police Department to report the disappearance of Mona Biddy, her mentally retarded stepdaughter. A massive search was conducted by the Jackson Police Department, law enforcement officers of Hinds and Rankin Counties, three or four hundred National Guardsmen, and many civilians and students.

On December 8th, five days after her reported disappearance, Mona's body was found by two fishermen in a cove on the Rankin County side of the Barnett Reservoir. Her body was at the water's edge and water from time to time would lap over it.

The first assignment of error was that the corpus delicti was not proven to the exclusion of every reason-

able theory consistent with innocence.

The corpus delicti in a homicide case consists of two fundamental facts: (1) The fact of the death of the deceased, and (2) The fact of the existence of a criminal agency as the cause of death. *Pitts* v. *State*, 43 Miss. 472 (1870). Both facts of the corpus delicti may be proved by circumstantial evidence. *Perkins* v. *State*, 160 Miss. 720, 135 So. 357 (1931).

On the afternoon of December 8, 1970, immediately after the body had been found, Dr. Forrest Bratley, a skilled and experienced pathologist, performed a complete autopsy on Mona's body at the University Medical Center in Jackson. His detailed written findings (a part of the record) ended with Dr. Bratley's positive opinion that the most probable cause of death was suffocation. The report also stated:

> "The complete postmortem examination does not reveal any natural cause of death nor is there any evidence of any traumatic injuries which could have caused death. The toxicological examination does not reveal the presence of any poison in the blood or stomach contents."

On June 24, 1971, Mona Biddy's body was exhumed, and a second autopsy performed by Dr. Forrest Bratley in conjunction with Dr. Donald Dore, Jr., the pathologist at the Singing River Hospital in Pascagoula, Mississippi. This autopsy was performed at Barrytown, Alabama, where the child had been buried.

This second autopsy was performed for the express purpose of determining whether Mona had swallowed any Liquid Plumr prior to her death. No signs or indications of any kind were found that the child had swallowed any caustic or corrosive substance. After a

very detailed and thorough examination on the witness stand, Dr. Bratley stated that in his opinion death was caused by suffocation and that this suffocation was by external application of force by someone stronger than the child. Dr. Bratley never wavered in his opinion as to the cause of death, even though he was extensively cross-examined as to other possible causes of death and the fact that findings of death by suffocation are similar to findings of death from heart disease, shock, laryngeal spasm, bronchial spasm, respiratory arrest and cardiac arrest. From his knowledge gained from personally performing the first and second autopsies, he clearly and decisively negatived any other cause of death. On the second autopsy, he and Dr. Donald Dore found no evidence whatsoever of Liquid Plumr or other caustic or corrosive substance in Mona's digestive tract or vital orgains. If Mona had had laryngeal spasm it would have had to have been caused by drinking Liquid Plumr or other caustic substance.

Dr. Howard Nichols, a skilled and experienced pediatrician of Jackson, who had been Mona's doctor for the first 1½ years of her life, after a detailed study of both autopsy reports testified that it was his considered opinion that the probable cause of death was suffocation due to external pressure over her nose and mouth. He further testified that it was his opinion that Liquid Plumr was not involved in Mona's death.

Dr. Arthur Hume, Associate Professor of Pharmacology and Toxicology at the University Medical Center and Toxicologist for the Mississippi Crime Laboratory, examined and tested blood samples, tissues of vital organs, gastric contents and other samples from Mona's body on December 9th, 1970, the day after her body

was found, for poisons and drugs. Dr. Hume testified that he would consider Liquid Plumr a poison. He found no poison of any kind in her system. He did find a slight trace of dramamine, a stomach settler.

Dr. Milton Helpern, the chief medical examiner of the city of New York, after examining the autopsy reports, testified that he could not state with certainty the cause of death. He testified as to possible causes only.

Dr. Lucien L. Leape, a pediatric surgeon with the University of Kansas Medical School, who had made a special study of problems linked with lye ingestion by children, testified that he could not say what was the cause of death. He did testify that he had never heard of any child dying as a result of swallowing Liquid Plumr.

The testimony of all of these witnesses, and the exhibits introduced, were for the consideration of the trial jury. We feel that there was ample evidence in the record to prove the corpus delicti beyond a reasonable doubt and to the exclusion of every *reasonable* theory consistent with innocence.

The next assignment of error was that the two oral statements made by appellant were inadmissible under the fifth, sixth, and fourteenth amendments to the Constitution of the United States.

It must be remembered, in discussing this assignment of error, that the appellant and her husband, Ted L. Biddy, asked the Jackson Police Department for its help in locating their mentally retarded daughter. Every lead that the police would get was discussed and examined with the Biddys. The police were in constant

touch with the Biddys and the Biddys with them. Both were apparently interested in what had happened to Mona Biddy.

It must also be kept in mind that, at the specific instance of the Biddys, the Jackson Police Department and its trained and skilled investigators and indeed the law enforcement officers of both Hinds and Rankin Counties and of the State of Mississippi, had expended a tremendous amount of time and effort and thought into solving the problem of what had happened to Mona.

On December 15, 1970, the police had found another item of clothing apparently worn by Mona at the time of her disappearance, so they contacted Mrs. Biddy, and she called her husband. The end result was that Mr. and Mrs. Biddy came down to police headquarters.

Lieutenant Wesley L. Reeves, Jackson Police Department, who had been on the case from the beginning, in the presence of Lieutenant Price of the Jackson Police Department, and Thomas Zebert, County Attorney of Rankin County, asked Mrs. Biddy to go over once again the details of Mona's disappearance. Reeves testified that after she had done this:

> "Then we told her we'd like to talk to her about it, and before we did, we would like to advise her of her rights.
>
> "Q—All right. Now, who was in this conference room at this time?
>
> "A—Lietenant Price, myself, and Mr. Zebert, Tom Zebert.
>
> "Q—And you four were the only ones in there?
>
> "A—Yes sir.
>
> "Q—All right. Then, what did you do then?

"A—I told her that she did not have to talk to us; that she was entitled to an attorney, and what she did say could be used against her in court.

"In fact, I then told her that we had a list of her rights on a statement blank, and I would like for Lieutenant Price to read them to her, so she would understand it.

"Lieutenant Price did read this statement of her rights, one at a time, and then I asked her if she understood each, and she said she did. Mr. Zebert asked her if she understood them, and she said she did.

"We asked her what education she had, and she said she was a high school graduate. We were convinced that she understood her rights.

"Q—Did she tell you where she had been employed previously?

"A—Yes sir. She had been employed as a secretary for Michael Baker, an engineering firm.

"Q—What kind of spirit was she in at this time?

"A—She was very cooperative. She seemed to be in good spirits."

At this time she signed a written waiver, which set forth her rights in detail. Reeves, Price and Zebert then signed as witnesses to her signature. She denied any involvement in Mona's disappearance.

Later on December 15th Mrs. Biddy and her husband went in their car to Highway Patrol Headquarters. Her rights were again explained to her and she signed a second detailed waiver.

On the night of December 16th, Lieutenant Reeves, while off-duty and at his home, received a telephone call from the Biddys reporting that appellant had been attacked and stabbed. The Biddys wanted him to come to their home, so he called Lieutenant Price and they

went to the Biddy home. Mrs. Biddy told them about the attack and how she had gotten away from her assailant. She had a superficial cut on her hip.

Late at night on December 26, 1970, Lt. Reeves received another telephone call from the Biddy home. It was reported to him that 2½-year-old Candice Biddy had been kidnapped. It was a very cold night and Lt. Reeves went immediately to the Biddy home. Mrs. Biddy stated that someone came in the window, came by Mr. Biddy who was asleep in the den, got Candice, and went back out the window, tying up the family dog and putting him into the closet. Mr. Biddy found Candice, scantily clad, near a ditch in the Biddy backyard. Lt. Reeves checked the window that Mrs. Biddy had pointed out and found dust on the windowsill that had not been disturbed.

Lt. Reeves was advised by Mr. and Mrs. Biddy that they were going to Georgia on the next day, December 27th, to visit Mr. Biddy's parents. Early on the morning of December 27th Lts. Reeves and Price went back to the Biddy home, looked around the backyard and the ditch but could find no evidence that someone had kidnapped Candice.

Being advised that the Biddys were ready to leave town and that Mr. Biddy would like to talk to them, the Biddys followed Reeves and Price back to police headquarters in their own car.

Out of the presence of Mrs. Biddy, Reeves and Price told Mr. Biddy that they had found that Mrs. Biddy had not modeled clothes for a local clothing store and received clothes for her services, as both Mrs. Biddy and Mr. Biddy had told them. They also told Mr. Biddy that Mrs. Biddy had not gone to a health studio once

a week, as she had told them. Reeves and Price also told Mr. Biddy that their investigation of the assault and stabbing of Mrs. Biddy had convinced them that it did not happen. Mr. Biddy agreed with them. They also informed Mr. Middy that Candice Biddy had not been kidnapped as Mrs. Biddy reported. Biddy agreed with them on this and asked to talk to his wife.

Before they had a chance to talk very much, Reeves was advised that Mr. Biddy's partner, Mal Sims, was downstairs and wanted to see Biddy. While Wright and Biddy were talking, Reeves and Price told Mrs. Biddy that they would like to ask her some questions, and before asking her any questions Lieutenant Reeves said:

> "[D]o you understand your rights? You have been advised of your rights before, and she said, yes, she understood them.
>
> "At that time, Mr. Biddy and Mr. Wright came back. Mr. Biddy came into the room, Mr. Wright stood at the door. He had told me previously that he was ill, and would have to go home. So, he left.
>
> "Q—Was Mrs. Biddy aware of the fact that Mr. Wright was there?
>
> "A—He came to the door, and the door was open. She was sitting right by the door. They did not talk, but he talked to Mr. Biddy.
>
> "Q—And did Mr. Biddy come in and talk to Mrs. Biddy?
>
> "A—Yes sir.
>
> "Q—All right. Tell me what happened.
>
> "A—At that time, Mr. Biddy began to talk to Mrs. Biddy, and asking her about these different instances, about the clothing store, about the health studio, about the stabbing and the kidnapping.
>
> "She admitted that she had not worked for the clothing store, and she partially admitted not having gone to the health studio as regularly as she had claimed to be going.
>
> "She admitted that she had faked the stabbing, and had faked the kidnapping.
>
> "At this time, Mr. Biddy became very emotionally upset, and—
>
> "Q—What about the appearance of the defendant, Mrs. Carolee Biddy? How was she at this time?
>
> "A—She was a little emotional, not very much, at that time. She seemed like she wanted to tell him something.
>
> "At that time I told her 'Mrs. Biddy, now is a good time to tell Mr. Biddy if you were involved in the disappearance of Mona'. I told her that Mona was gone, she wouldn't—couldn't come back, and that she was afflicted, that the doctors had told us she would never get any better, and that now would be a good time to talk to her husband.
>
> "They were sitting facing each other holding hands. She looked straight at Mr. Biddy, and said, 'Ted, I am sorry I did it.' She said 'Ted, I didn't mean to do it.' And she broke down. She stopped what she was going to say.

Mrs. Biddy then continued her story of what happened the night of December 2nd. Mona had gotten hold of some Liquid Plumr at about 7:30 P.M., had drunk some of it, that it made her violently ill and she vomited. Mrs. Biddy tried to feed her but Mona could not eat. Mrs. Biddy called Dr. Howard Nichols, her pediatrician, and Dr. Nichols advised her to examine Mona's mouth and if her mouth was burned on the inside to call him back. If Mona's mouth was not burned, she was all right and just give her something to settle her stomach. Mrs. Biddy put Mona to bed

around 8:30 P.M. Mrs. Biddy went by Mona's bed about 10:30 P.M. and found her "scooted down the bed" with the bed clothing wrapped around her head. Lt. Reeves continued:

> "She said she unwrapped the bed clothing and couldn't get any response from Mona. She said this frightened her, and she picked Mona up and took her out to the den, and laid her down on the couch. She said she just flopped down.
>
> "She said she started to call Ted, but she was afraid that people would think that she had something to do with it; that she had realized she was dead, and she was afraid to call Ted, she said.
>
> "She started to call a doctor, and she just decided to get rid of the body, and take the body so they wouldn't blame her with it. She carried her out and put her in her car and drove to the reservoir.
>
> "She drove to a particular spot near the Lakeview Marina, because she and Ted had spent a lot of time out there in the past. She said she put the body down near the bank, kissed it on the forehead, and left it there so it would be found, and then she came back home."

We think that this testimony was properly admitted. It is perfectly clear to us that Mrs. Biddy thoroughly understood her rights and that she had intelligently waived them, not once but twice in writing, and also several times orally. Even on December 27th, immediately before her statements she acknowledged that she understood her rights. There are no magic words that law officers must meticulously repeat each time they question a person. This conclusion was also reached in *Maguire* v. *United States*, 396 F.2d 327 (9th Cir. 1968); *Sossamon* v. *State*, 432 S.W.2d 469 (Ark. 1968); *People* v. *Hill*, 58 Cal. Rptr. 340, 426 P.2d 908

(1967); *State* v. *Graves*, 259 La. 526, 250 So.2d 727 (1971); *State* v. *Rowe*, 468 P.2d 1000 (Wash. 1970).

Appellant next contends that the court erred in granting an instruction advising the jury that should they convict appellant of manslaughter, the court might sentence appellant to the penitentiary for a term not to exceed twenty years.

This is the instruction complained of:

> "The Court instructs the Jury for the State of Mississippi that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Carolee Biddy, is guilty of manslaughter, you should certify to the Court the following verdict, to-wit:
>
> We the Jury, find the Defendant guilty of manslaughter.
>
> Whereupon the Court might sentence the Defendant to serve a term of years in the penitentiary, not to exceed 20 years."

This same contention was made long ago in *Stevenson* v. *State*, 136 Miss. 22, 100 So.525 (1924). The Court in *Stevenson* answered this argument in this way:

> "In the case now before us the instruction informed the jury that in case of a conviction of manslaughter the court might sentence the defendant to serve a term of years in the penitentiary, not to exceed twenty years. We do not think that this instruction can properly be said to be an invitation or inducement to the jury to compromise on the lesser offense, and, if this instruction was error at all, it was not prejudicial to the rights of the appellant and will not justify a reversal under the facts of this record." 136 Miss. at 29-30, 100 So. at 526.

In *Blalock* v. *State*, 148 Miss. 1, 113 So. 627 (1927), in ruling on a similar manslaughter instruction, the

Court had this to say:

> "In the case before us, the instruction on the punishment for manslaughter does not call the jury's attention to the minimum punishment, and does not, by inference, lead the jury to believe that, if so convicted, a light punishment will be inflicted. We think this distinction important between the Ellerbe case and this one. It is one thing to hold out the definition of a minimum punishment, and another to tell the jury of a maximum punishment. It was, in our opinion, the singling out, in the Filerbe case, the minimum features of punishment of manslaughter, that produced the reversal therein. It is difficult to see how it prejudices the right of a person being tried for a crime for the jury to know what the punishment is that may follow a conviction for that crime. It is true that the court administers the punishment, except in capital cases, and some others not here involved, and that the jury should not be told anything in reference to what that punishment will be; but we fail to see how the present instruction prejudiced the defendant's rights. It certainly did not lead the jury to believe he would be dealt with leniently. The maximum was stated, and the minimum was left out.
>
> "In so far as the effect on the jury is concerned, we cannot see it had any harmful effect upon his rights. Anything less than twenty years for manslaughter is in the discretion of the court, and it does in no wise prejudice the defendant's rights for the jury to know what the maximum would be. At least, we think it is apparent that his rights were not so prejudiced as to cause the court to reverse a judgment therefor. *Stevenson* v. *State*, 136 Miss. 22, 100 So. 525. We hold, therefore, that there is no reversible error in this objection to the instruction." 148 Miss. at 5, 113 So. at 628.

The final assignment of error was that the trial court erred in overruling the motion to vacate the judgment because the jury verdict was returned on Sunday and the trial judge sentenced the appellant on Sunday.

The five-day trial was concluded on Friday, September 3, 1971, and the jury on that day, with the exhibits and written instructions of the Court, retired to the jury room to consider what verdict they should return. They were unable to reach a verdict and they resumed their deliberations on Saturday, September 4th. Still being unable to reach a verdict, they resumed their deliberations about 9:30 A.M., Sunday, September 5th, and about 2:30 P.M., they returned their verdict in open court. Monday, September 6, 1971, would be Labor Day. So, the Court inquired of Counsel for the Defendant whether they desired that sentence be deferred until a later date. Counsel for the Defendant responded that they did not so desire. Whereupon, the Court sentenced the Defendant to twenty (20) years in the State Penitentiary.

In *Burrage* v. *State*, 101 Miss. 598, 58 So. 217 (1912), a murder prosecution was concluded on Saturday night, and the jury returned its verdict into court at 12:06 A.M. Sunday morning. In that case, it was contended that tht verdict and judgment were null and void because rendered on Sunday. This Court affirmed the conviction and sentence, stating:

> "It is true that we have no statute providing that verdicts may be received on Sunday, and it may be that a judgment rendered on Sunday is void, but 'in regard to the delivery and reception of verdicts a different rule applies, as the rendering of a verdict is a mere ministerial act, and it is an act of necessity and charity to receive it and not

keep the jurors confined until Monday.' " 101 Miss. at 606-607, 58 So. at 219.

In *State* v. *Foss*, 158 La. 471, 104 So. 211 (1925), trial was begun on Friday and the taking of evidence was concluded on Saturday night at 11:20. Counsel for defendant stated to the court that he was eager to continue the trial. Whereupon, the prosecutor objected on the ground that if the trial proceeded and resulted in conviction that the continuation of the proceeding on Sunday might be urged as a ground for a new trial. Defense counsel gave his word that if the case were allowed to proceed no advantage would be taken of the fact that some of the proceedings had been held on Sunday. The case proceeded, with argument of counsel ending at 12:25 A.M. Sunday, at which time the jury was charged and the verdict was returned and recorded at 2:00 A.M., Sunday.

Appellate defense counsel (not the trial defense counsel) urged that these Sunday proceedings were void. In *Foss*, the Supreme Court of Louisiana held:

> "An accused has no right to stand by and suffer proceedings to take place on a 'statutory holiday,' and after verdict, in a motion to quash, ask to have the proceedings reversed on the ground that it was a holiday.
>
> "The objection should not have been postponed until after verdict, nor urged for the first time in motion in arrest.
>
> "Moreover, the proceedings on a statutory legal holiday are not necessarily null. They may be held on that day by consent. Besides, an accused may be concluded by his silence, if he chooses to remain silent when he is represented by counsel amply able to protect his rights.

> . . . . . .
>
> "[A]n accused may waive his constitutional, statutory, or common-law rights, except when forbidden by some superior counter principle of law deemed necessary for his protection.
>
> "There is no constitutional, statutory, or common-law principle which forbids an accused party from consenting to have his case argued, submitted, and determined by the jury and court on Sunday or a statutory legal holiday. . . .
>
> . . . . . .
>
> "*There is no question of the waiver of jurisdiction in this case. The court and the jury were legally constituted, and were competent to try the issue of guilt or innocence between the state and the accused.* The only question was whether the case should proceed to its conclusion on Sunday or be postponed to a future day.
>
> "*Whether a trial shall take place on one day rather than another can in no sense be said to affect the jurisdiction and competence of the court.*
>
> "The objection is purely technical and dilatory in its nature. If it had been made at the proper time, the case would have been delayed to another day, with the same result. The defendant has suffered no detriment caused by the continuance of the trial on Sunday.
>
> "An accused party at whose instance and on whose persuasive promise a case has been continued and concluded on Sunday, and who took the chances of an acquittal, should not be permitted, after verdict of conviction, to challenge the regularity and legality of such proceedings.
>
> "To ignore his request and promise to the court and district attorney whereby he gained a speedy determination of his case, and to set aside the

verdict on the ground urged, would be a palpable miscarriage of justice, destroy the sanctity of the court, and make a mockery of judicial procedure.

"Our conclusion is that the prohibition of the continuance of the trial on Sunday of a case already begun does not affect the jurisdiction and competence of the court, and is not such as cannot be waived by an accused party." 158 La. at 475-478, 104 So. at 212-214. (Emphases added).

The judgment of the Circuit Court is affirmed.

AFFIRMED.

GILLESPIE, C. J., and PATERSON, INZER and BROOM, J. J., CONCUR.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,095

No. 47,100

MRS. CAROLEE BIDDY

v.

STATE OF MISSISSIPPI

[February 26, 1973]

INZER, *Justice:*

ON PETITION FOR REHEARING

The only assignment of error in the Petition for Rehearing is:

THE COURT DID NOT FULLY CONSIDER THE ADMISSIBILITY OF THE STATEMENT OF APPELLANT.

In her brief in support of her Petition for Rehearing, appellant quotes from *Miranda* v. *Arizona*, 384 U.S. 436, 444, 445, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 707 (1966):

> *If, however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking there can be no questioning . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with an attorney and have him present during any subsequent questioning.* (Emphasis added).

In our original opinion, we discussed at length the two occasions on December 15, 1970, when appellant's *Miranda* rights were explained orally in detail, and when she signed two written waivers setting forth her

rights in detail. We quoted the testimony of Lt. Reeves wherein he testified that on December 27, 1970, he again asked Mrs. Biddy if she understood her rights, and she replied that she understood them.

After a careful search of the record, we find that nowhere in this record does Mrs. Biddy, the appellant, request, indicate, hint or express a desire to speak with or consult an attorney; although she was well aware that an attorney was available. Nowhere in any shape, form or fashion does she express a desire to have an attorney present during any questioning, nor does her husband express any wish or desire to have an attorney present.

All statements that Mrs. Biddy made on December 27, 1970, were made freely and voluntarily and mostly on the solicitation of her husband.

Ted L. Biddy, the husband of appellant Carolee Biddy, testified for the defense on direct examination as follows:

> Q. Then, if you remember, what did you say to Carolee or Detective Price or Reeves?
>
> A. Well, I was up real close to her, I had her hands in mine, I was right up next to her. I told her, I says, "Honey, I've got something very serious to say to you now. They have told me that they have found no evidence that you were attacked that night, nor that Candice was abducted last night and they believe that you staged these as hoaxes."
>
> Q. Go right ahead.
>
> A. Well, she admitted that they were true by shaking her head affirmatively that she had. She was emotional, of course, during this. I then told her that there was something else that they had told me that I wanted to tell her and that was

> that they had told me that they had three witnesses who had seen a woman, fitting her description, walking around in a rose nightgown at the Main Harbor Marina on the night Mona disappeared.
>
> Q. What did Carolee go on and say, what was her story?
>
> A. Well, Lieutenant Reeves and Lieutenant Price started talking to her and asking her about it and she says, "Well, I said I did not go in to check on Mona before I went to bed but I did." She said that she had watched some TV program and had dozed off, it was 10:30 or 11:00 o'clock, and that she went in to check on her before going to bed and she couldn't see Mona in the bed. She said all she could see was a big fluffy pillow and she went over to get her out from under the covers; it was nothing unusual for Mona, she was a hyperactive child, and she would be a lot of times under the cover. No one could sleep with Mona because she was so hyperactive. She said that she went to get her out from under the covers and pull her up in the bed, straighten her up, and the covers were all twisted around her and that when she raised the covers up that it pulled Mona up with it and when the covers came off she fell back and she knew immediately something was wrong. She said she picked her up on her shoulder and took her into the den, laid her down on the couch with her head in her lap and checked her in every possible way, her breathing, her pulse, shaking her and finally realized that she was dead.
>
> Q. What did she then tell the policeman that she did?
>
> A. She said that she panicked. She said she could just see my ex-wife Ruth's face; that she knew she would be blamed. She said she started to come get me. She started to call the doctor but she could just see my ex-wife's face and that she panicked. And that she picked her up, put her in

the front seat of our car; she said she drove and didn't know where she was going but the next thing she remembers she was on the reservoir levee road and that she went to the area of the Lake View Marina, took her body out of the car, took her over to the edge of the bank on a grassy spot, laid her down, kissed her and drove back home. She said she couldn't remember anything about driving back home except that the car almost went out of control one time.

In summary, it is apparent from the record in this case that all of the constitutional rights of Mrs. Biddy had been fully explained to her, she fully understood them, and with this knowledge, she freely and voluntarily made the statements complained of, mostly at the solicitation of her husband. It is not contended that she was in any way coerced, threatened or made any promises by the officers. She never at any time expressed any desire to speak with or consult with the attorney with whom her husband conferred. Neither did she express any desire to consult with any other attorney or have an attorney present before she made any statement. A statement made under these circumstances certainly should be and is admissible in evidence.

For the reasons stated the petition for rehearing is denied.

ALL JUSTICES CONCUR.

APPENDIX C

[Filed April 23, 1974]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION
CIVIL ACTION NO. S74-2(C)

CAROLEE BIDDY,

Applicant,

v.

JACK REED, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL

Respondents.

The applicant (Carolee Biddy) filed her application for a writ of habeas corpus directed to the respondents wherein she requested relief from a twenty year sentence by the Circuit Court of Jackson County for the crime of manslaughter. Applicant was convicted of killing her retarded six year old stepdaughter on the evening of December 2, 1970. The child was found by a searching party on the reservoir about thirteen miles away from her home on December 8, 1970, resulting in an intensive investigation of the crime by the city of Jackson police officers. Applicant and her husband (father of the deceased child) cooperated with the police in their search and investigation and became friendly with Officers Reeves and Price who were assigned to the case. These peace officers visited the Biddys in their home and discussed their problems and progress with the case very freely on innumerable occasions.

Applicant, as stepmother of this retarded child, was always under consideration as a suspect. The officers

requested applicant's husband to take a lie detector test and requested him to request applicant to take such polygraph test at the same time. Both of them failed the test. Applicant insisted that some maniac was loose in the area and that he was responsible for the crime. Applicant pretended as a hoax that someone had stolen her own child through the window of its room and had left it in their yard in extremely cold weather. She next contended as another hoax that someone had attacked her and had inflicted certain wounds on her body in the skirmish. She later admitted the falsity of both representations. The officers investigated leads and checked on information almost daily with the Biddys at their home and at police headquarters in Jackson. Applicant was finally arrested and fingerprinted and booked for the crime of murder at police headquarters on December 27, 1970. The Biddys were at police headquarters at the officers' *request* prior to the Biddy's planned trip to Mr. Biddy's family in Georgia. The investigations of these officers up until that time were routine investigations, and never accusatory in nature. Charles Wright, a young attorney and friend of the family, employed John R. Poole, an experienced criminal lawyer, to represent the Biddys on December 27, 1970.

The facts in this case show that on the 15th day of December 1970 that these officers explained the *Miranda* rights to the applicant who signed a waiver. Another printed form of *Miranda* rights was signed by applicant at a later date not given and not shown in this record. In each instance she was positively told that before any questions were asked, though she was not at the time in custody, that she must understand that she had the right to remain silent and answer

nothing; and that anything she said could be used against her in court, and that she had the right to talk to a lawyer and to have him with her during questioning; that if she could not afford a lawyer one would be appointed for her before any questioning, if she wished; and that she had the right to stop answering any questions at any time until she talked to a lawyer. She had a high school education and had been a secretary for a business firm. The officers testified that she understood her rights.

The court finds as a fact that applicant is an intelligent person and that she fully and completely understood her *Miranda* rights at all times, and that she acted with full knowledge of her rights at such times. Attorney Charles Wright had known Mrs. Biddy since 1967. Wright represented her husband in his business in Jackson. He was at the Biddy home from time to time when the officers were there and participated in discussions. He participated in the manhunt which resulted in finding the dead child at the reservoir on December 8, 1970.

The officers began talking with the Biddys on December 3, 1970, the day after the child disappeared. On December 15, applicant voluntarily went to police headquarters and identified the clothing in which the child was clad when found. Her attorney (Poole) told her not to sign anything for the officers. John Poole testified that he told the police that he did not want applicant to make any statements in his absence. The officers on this particular occasion (December 27, 1970) did not read to applicant her *Miranda* rights, but simply asked her if she understood such rights which had been previously explained and expressly waived,

and she answered in the affirmative. On December 27, 1970 after her attorney (Poole) had left the police station and promised to return the next morning, the applicant surprised the officers by voluntarily stating to them and to her husband for the first time that she found the child dead in bed and carried it and left it at the reservoir. She never signed a statement to that effect and was not asked to do so. On that occasion she promised the officers to accompany them the next morning to the reservoir where she would show them exactly where she deposited the body of the child. Her attorney (Poole) came to police headquarters early the next morning (December 28, 1970) after applicant's return from the reservoir.

Applicant was not arrested and booked for murder until the afternoon of December 27, 1970 when she first told the officers and her husband some of the facts about her participation in this crime. Prior thereto she was a mere suspect with others who were being investigated, but from that date she was accused of murder and was promptly arrested and charged with that crime.

There is nothing in this record before the Court to show that what applicant told the Court on December 27, 1970 was of any aid or benefit to the state, and the record does not show that the state offered anything at the trial which applicant divulged to them at such time. Due process requires that a criminal must understand her *Miranda* rights, and that such rights may not be abused with a resulting unfair conviction for that crime.

The applicant has not shown this Court by the greater weight of the more convincing evidence that

any such advantage was taken of her by these officers which resulted in any unfair or improper conviction for this offense. She was convicted under this murder indictment of the offense of manslaughter of this child without any assistance from her for anything that she said to the officers, or did for the officers. She never signed any statement confessing any complicity in this crime. She showed the officers on December 28, 1970 where she placed the child at the reservoir on December 3, 1970, but the child's body was found out there on the reservoir by a searching party on December 8, 1970 without any assistance from applicant. The officers did, indeed, resourcefully and skillfully investigate this crime, and talked with this suspect extensively on numerous occasions about the crime, but always with no effect. Mr. Biddy repeatedly evinced his convictions as to his wife's innocence by assuring the officers that applicant loved the child and thought too much of her to hurt her.

The court finds as a fact and concludes as a matter of law that applicant was not convicted of this crime by reason of any unfair assistance from her to these officers in violation of her civil rights, but the facts are that she never told these officers the facts to this date as to how she committed this crime to take the life of this child. She is even now still contending at this time in this case that this child was suffocated by voluntarily drinking liquid plumber.

An autopsy of the body of this child was made and the experts could not find any liquid plumber in the autopsy. Some contention is made here that the state did not furnish applicant with all of the facts about this autopsy to have enabled them to give the Court and

jury the benefit of their best expert advice as to the cause of death of this child. The four photographs of the throat of this child were and are not sufficiently clear as to reveal to the examiner the existence or not of swelling in this area which was actually clearer and more revealing from the original material itself. Applicant's doctors had this original material in hand for weeks before the second trial of this case which resulted in this conviction. This child had been buried for some time before this autopsy, but the material itself revealed vastly more than did these pictures as to edema, or swelling in the area. The applicant and her experts could not possibly be adversely affected by the neglect to deliver these pictures and slides to them.

Expert testimony must be carefully analyzed and applied in this delicate area very cautiously. This Court is not impressed with this expert testimony and reasonable inferences which it deduces from it that these doctors are in a position to even give us the benefit of an educated guess as to any advantages or effect, or result of another trial. The District Attorney who tried this case testifies that he withheld nothing from applicant's attorneys and gave them all of the information which he had for their examination for weeks before the trial.

Among other things, applicant insists that her vested rights were violated in this conviction in that the state of Mississippi suppressed favorable evidence to her in violation of the rule announced in *Brady v. Maryland.*[1]

[1] *Brady v. Maryland*, 83 S.Ct. 1194 holds: "We now hold that the *suppression* by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

On July 27, 1971 the state court ordered the state of Mississippi to furnish the applicant through her attorneys and medical authorities for the purpose of analysis, study and evaluation the following material: (1) A duplicate of all microscopic slides and the paraffin blocks from which the slides were made of both autopsies; (2) A sample of all tissues taken from the body which were not embedded in the paraffin blocks; (3) All pictures taken at either autopsies; (4) A complete autopsy report of the second autopsy; (5) Any further medical information relating to the death of Mona Biddy in the hands of the State of Mississippi.

The contention of applicant's counsel to be properly understood and correctly applied must be considered in proper context. The applicant objects here for the first time to four certain photographs and slides made from the autopsy material of the victim's throat. The applicant contended on the first trial which resulted in a mistrial that this child died from having ingested a drink of liquid plumber. In furtherance of that defense, the applicant introduced as her exhibit in the case a specimen of liquid plumber containing the 6% solution of potassium hydroxide. The second autopsy was performed by the state in Alabama where the child was buried. Apparently, the sole objective of this autopsy was for the purpose of checking and testing the body of this child to see whether or not it contained any presence or effect of liquid plumber. The result was not any evidence against the applicant, but the second autopsy simply showed that the child died of strangulation, not in any wise induced by any swelling of the larynx and throat area occasioned by any liquid plumber. The autopsy revealed no liquid plumber in the body of the child.

The applicant complains here for the first time that four photographs made of this autopsy material and some slides were not delivered to applicant, or her counsel before trial. The evidence shows this Court in such connection that the July 27, 1971 order of the state court was substantially complied with by the state in the trial of this case and that any other or further compliance with the order of the court was waived.[2] The applicant says that her experts were unable in the brief time afforded at the trial to sufficiently examine and analyze and criticize these photographs and slides. Significantly, this second autopsy revealed facts already known to applicant, i.e., namely that all information given by applicant and all of her contentions were false and not in any wise supported by facts. The facts are that the attorneys for the applicant and more specifically their medical witness had the materials (sections of the child's throat) themselves in hand for weeks before the trial, and could have made photographs and slides as desired at all times. But the applicant never complained at the trial of any such neglect, or violation of any duty of the state under the court order to have delivered such material to their medical witness at an earlier time; and never at such trial requested any delay, or indulgence to examine and

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[2] In *United States of America v. Teodulo Diaz-Rodriguez*, (9CA) 478 F.2d 1005, 1007-8 in analyzing and applying *Brady v. Maryland*, supra, said: "A test has been phrased whether the undisclosed evidence was so critical that its absence prevented the defendant from receiving a fair trial under the Constitution. United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972). But materiality—the existence of prejudice—is essential. A new trial is not automatically required whenever the prosecution's files subsequently reveals evidence of possible utility to the defense but of unlikely weight in altering the verdict. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 105 (1972)."

analyze such material as desired. The contention now made was clearly waived.

The evidence which the state discovered from this autopsy was not under such circumstances suppressed by the prosecution. Nothing favorable to the applicant in her defense of this indictment was revealed by the process. The second autopsy simply revealed unmistakably that the applicant's defense that this child died by reason of having drunk liquid plumber was not true. The testimony showed to the satisfaction of the jury beyond every reasonable doubt that this child was manually suffocated and did not suffocate by reason of any swelling occasioned by any ingestion of any poison such as liquid plumber. The facts and circumstances here show and even demonstrate that the naked eye can best detect swelling, and that slides and photographs of the area are of little value.

The evidence and testimony adduced by the applicant simply does not show this Court by the greater weight of the more convincing evidence that any constitutional right whatever of the applicant was violated by her conviction in this case. The Court finds as a fact and concludes as a matter of law that the applicant has failed to show the Court by a preponderance of the credible evidence that her conviction is void for any such reason in this case. The application of Carolee Biddy for a Writ of habeas corpus in this case is without merit and will be denied.

A judgment accordingly may be presented by the respondents to the Court for entry within five days after this date under the rules of this Court.

April 23, 1974

/s/ HAROLD COX
UNITED STATES DISTRICT JUDGE

APPENDIX D

Carolee BIDDY, Petitioner-Appellant,

v.

Fred DIAMOND, Sheriff, Jackson County Jail, and Jack Reed, Warden, Mississippi Penitentiary, Respondents-Appellees.

No. 74-2385.

United States Court of Appeals,
Fifth Circuit.

July 18, 1975.

State prisoner filed a petition for a writ of habeas corpus. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., denied the petition, and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that full Miranda warnings were not required on December 27 and 28, dates of defendant's damaging statement and identification of place where she had left body, where defendant on December 27 in response to police question expressly stated that she remembered her rights as previously explained to her, even though defendant had on December 15 requested an attorney, since defendant had not been denied opportunity to consult with her attorney when requested; that, in homicide prosecution, state did not impermissibly suppress exculpatory evidence consisting of photographs, taken during autopsy, of physical sections of victim's body; and that failure to produce photographs pursuant to discovery order of state court, even if error as a state procedural matter, did not rise to a constitutional level.

Affirmed.

1. Courts 406.1(6)

Court of Appeals was not required to address appellant's points which, regardless of their merit, would not control outcome of appeal.

2. Criminal Law 406(2)

When a person knows her rights, and has even exercised the right to counsel, and has talked with counsel, later voluntary admissions can constitute a waiver of the rights to counsel and to remain silent.

3. Criminal Law 412.2(5)

There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them.

4. Criminal Law 412.2(5)

Repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights knowingly and intelligently waived them.

5. Criminal Law 412.2(3)

Full Miranda warnings were not required on December 27 and 28, dates of defendant's damaging statement and identification of place where she had left body, where defendant on December 27 in response to police question expressly stated that she remembered her rights as previously explained to her, even though defendant had on December 15 requested an attorney, since defendant had not been denied opportunity to consult with her attorney when requested. U.S.C.A. Const. Amend. 6.

6. Criminal Law 641.4(1)

Even though an attorney is once requested or retained, the right to an attorney can be subsequently waived. U.S.C.A.Const. Amend. 6.

7. Criminal Law 412.2(4)

A person may voluntarily speak without an attorney present, even though he knows one to be on the way upon request, if the police actions are not compelling. U.S.C.A.Const. Amend. 6.

8. Criminal Law 351(2)

Where defendant was positively told more than once during morning that, if she did not want to, she did not have to make trip to reservoir, which she subsequently identified as place where she had left body, but defendant insisted that that was what she wanted to do, and thus, with full knowledge of her rights and additional admonition that she need not go, there was no legal impediment to preclude defendant from waiving those rights and making trip, and, having done so voluntarily, evidence as to conduct could be used at her trial. U.S.C.A.Const. Amends. 5, 6.

9. Criminal Law 700

In homicide prosecution, state did not impermissibly suppress exculpatory evidence consisting of photographs, taken during autopsy, of physical sections of victim's body, where state had no experts who would testify that photographs revealed any doubt as to cause of death, photographs were introduced at trial without objection and there was no indication the defense could not have had its experts take as much time as they needed to study photographs during trial.

10. Criminal Law 627.8(6)

Failure to produce photographs pursuant to discov-

ery order of state court, even if error as a state procedural matter, did not rise to a constitutional level.

11. Habeas Corpus 45.3(1)

Point relating to newly discovered evidence which had not been presented to state court could not be reviewed by a federal court on petition for habeas corpus.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GOLDBERG and RONEY, Circuit Judges, and GROOMS, District Judge.

RONEY, Circuit Judge:

Petitioner, Carolee Biddy, was convicted in a Mississippi state court of manslaughter of her six-year old stepdaughter. The facts of the case are recited in some detail in the opinions of the Supreme Court of Mississippi affirming the conviction and denying the petition for rehearing at Biddy v. State, 277 So.2d 115 (Miss. 1973).

From the denial of a petition for writ of habeas corpus, after a full evidentiary hearing, petitioner presents essentially two appeal issues: first, whether admissions and conduct of appellant, used against her at the trial, were induced by the police in violation of her *Miranda* rights, and her constitutional rights not to testify against herself and to have effective assistance of counsel; and second, whether petitioner's constitutional right to due process was violated by alleged prosecutorial suppression of evidence, four photographs which were withheld by the state from discovery but which were introduced at trial. Finding no error, we affirm.

We are at once met with confusion as to the facts of

the case because of the failure of the district court to resolve some apparent conflicts in the evidence and to reflect in its opinion specific facts which the appellant indicates to be critical to the success of her petition. We have made a thorough review of the state court record, the testimony before the district court, and the extensive briefs and oral argument, however; and have concluded that, even with the inadequacy of the district court's opinion, the court cannot be held to be clearly erroneous as to the controlling facts, and that it was not in error as a matter of law in denying the petition for writ of habeas corpus. In other words, we have approached this case from the standpoint of whether, assuming the facts to be as oriented by the appellant but without the conclusory or judgmental overlay given them in appellant's brief ere is any base upon which to reverse the district court's refusal to grant the petitioner relief from the state court conviction.

A brief outline of the facts of the case will furnish sufficient base for an explanation of our decision. A full recitation as to all the details of the case would serve no useful purpose.

Early on the morning of December 3, 1970, petitioner called the Jackson Police Department to report the disappearance of Mona Biddy, her six-year old, mentally retarded stepdaughter. An extensive search for the child was conducted by the police, which eventually involved various other law enforcement officers of surrounding counties, three or four hundred National Guardsmen, and many volunteer civilians. On December 8, five days after her reported disappearance, Mona's body was found on the water's edge at a reservoir, about thirteen miles from the Biddy residence.

Wesley Reeves and Harry Price, the detectives assigned by the Jackson Police Department to conduct the investigation into Mona's disappearance, were in close contact with the Biddy family during the following weeks. On December 15, petitioner agreed to accompany these officers to police headquarters in order to identify an item of clothing apparently worn by Mona at the time of her disappearance. After the clothing had been identified, petitioner was asked if she would be willing to talk to the detectives about the details of Mona's disappearance. She agreed to do so and was taken to a conference room, accompanied by Reeves, Price, and a county attorney named Tom Zebert. She was then advised of her *Miranda* rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), and signed a written waiver indicating that she understood those rights. Reeves, Price, and Zebert each testified that they were convinced that she understood her rights and that her waiver was voluntary. In response to questioning on this occasion, she denied any involvement in Mona's disappearance.

Later that day, prior to taking a polygraph test, petitioner was again advised of her rights and she signed a second waiver form. She further evidenced her understanding of her rights by asking for "her lawyer" during the administering of the polygraph test. Upon that request, the test was halted and petitioner was questioned no further. That evening Detectives Reeves and Price stopped by the Biddy home and were advised by an attorney-friend of the Biddys, Charles Wright, that this was neither the time nor place for further questioning of petitioner. Accordingly, they departed without talking to Mrs. Biddy about Mona's disappearance.

During the next ten days, although the detectives did not further pursue questioning petitioner about Mona's disappearance, they were, on at least two occasions, called to the Biddy residence to investigate rather bizarre incidents involving petitioner and her family. On the evening of December 16, they investigated a report that Mrs. Biddy had been attacked and stabbed in the hip by an unknown assailant. They received another call from the Biddy home on the night of December 26. It was reported that petitioner's two and one-half year old daughter, Candice, had been abducted. By the time the detectives arrived at the Biddy residence, the child had been found by Mr. Biddy near a ditch in the backyard. The detectives found little evidence to bear out petitioner's story regarding each incident and concluded that Mrs. Biddy's accounts were "illogical." Mrs. Biddy later admitted that she staged both incidents.

On December 27, the Biddys were asked to come to police headquarters before they left on a trip to Georgia to visit Mr. Biddy's parents. Before leaving their house, and in the presence of the police officers, Mr. Biddy asked his business partner, Mal Sims, to call their attorney, Charles Wright, and ask him to meet them at the police station. Sims complied with the request.

At the police station, the detectives separated the two and talked with Mr. Biddy about several things that petitioner had told them, which they considered to be untrue. About this time Attorney Wright arrived and stated that he was ill and would summon another attorney. While Mr. Biddy was talking to the attorney, the detectives indicated they might want to question Mrs. Biddy and asked her, "Do you understand your

rights?" To this she responded that she understood them. Then Mr. Biddy came in and discussed several things with petitioner with the detectives present. During that discussion, she made the crucial statement to him that she had found the child dead from having swallowed Liquid Plumr and, fearing that someone would blame her for it, had taken the body to the reservoir. After this statement she was booked for murder. Subsequently, the attorney summoned by Wright arrived and told petitioner not to talk to the police unless he was present. The next morning she took the police to the reservoir and identified the place where she had left the body. It was the same place where the body had been found.

Petitioner makes five separate contentions, under her general *Miranda* attack, on the use at trial of the statement she made on December 27 and her showing, on December 28, the place at the reservoir where she had left the child's body. Parenthetically, we have noted petitioner's complaint that the district court was in error in stating that nothing told to the police on December 27 was of any aid or benefit to the state, that the record did not indicate that anything she said was offered at the trial, and that her actions on December 28 were of no assistance in the state's case. These statements were clearly erroneous, but do not seem to have affected the district court's consideration of the controlling issues in the case. For the purposes of considering this appeal, we assume that the use of petitioner's statements and conduct on December 27 and 28 in the state trial was crucial to the successful prosecution and conviction of the petitioner.

[1] The first two of petitioner's five points need not

be addressed because, regardless of their merit, they would not control the outcome of this appeal. First, petitioner contends that the waivers signed on December 15 of her Sixth Amendment rights were vitiated in view of her later request for a lawyer, and that in any event the waivers were "stale" by December 27 when she made the statements admitted at trial. Our decision does not depend upon the continued legal effectiveness of those waivers.

The next question posed by petitioner is whether the oral warning, framed as a question as to whether she remembered her rights on December 27, just before she made the damaging statement, was an effective *Miranda* warning, in light of her request for a lawyer on December 15. We think that it was.

The critical legal question is whether the overall activity of the police sufficiently comports with the requirements concerning the *Miranda* warnings to insulate the conduct and admissions against suppression.

[2-6] It is clear that when a person knows her rights, and has even exercised the right to counsel, talking with counsel, later voluntary admissions can constitute a waiver of the rights to counsel and to remain silent. United States v. Brown, 459 F.2d 319 (5th Cir. 1971), cert. denied, 409 U.S. 864, 93 S.Ct. 155, 34 L.Ed.2d 111 (1972). The question is whether the full *Miranda* warnings were required on December 27 and 28, even though in response to the police question petitioner expressly stated that she remembered her rights as previously explained to her. We think not. We have previously held that "there is no requirement than an accused be continually reminded of his rights once he has intelligently waived them." United States v. Anthony, 474 F.2d 770, 773 (5th Cir. 1973). A great

many courts, state and federal, have likewise held that repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights, knowingly and intelligently waived them. United States v. Anthony, 474 F.2d 770 (5th Cir. 1973); Miller v. United States, 396 F.2d 492 (8th Cir. 1968); Maguire v. United States, 396 F.2d 327 (9th Cir. 1968), cert. denied, 393 U.S. 1099, 89 S.Ct. 897, 21 L.Ed.2d 792 (1969); Gorman v. United States, 380 F.2d 158 (1st Cir. 1967); United States v. Kinsey, 352 F.Supp. 1176 (E.D.Pa.1972); State v. Gallagher, 36 Ohio App.2d 29, 301 N.E.2d 888 (1973); Commonwealth v. Abrams, 443 Pa. 295, 278 A.2d 902 (1971); State v. Rowe, 77 Wash.2d 955, 468 P.2d 1000 (1970); State v. Blanchey, 75 Wash.2d 926, 454 P.2d 841 (1969); Brown v. State, 6 Md.App. 564, 252 A.2d 272 (1969); State v. Magee, 52 N.J. 352, 245 A.2d 339 (1968); People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367 (1968); State v. Lucia, 74 Wash.2d 819, 447 P.2d 606 (1968); People v. Schenk, 24 Cal.App.3d 233, 101 Cal.Rptr. 75 (1972); People v. Brockman, 2 Cal.App.3d 1002, 83 Cal.Rptr. 70 (Ct. App.1969).

We think that a further delineation on December 27 of petitioner's rights, which she had stated that she understood from prior explanations would have been needlessly repetitious. The district court was not clearly erroneous in finding that Mrs. Biddy fully understood her rights at the time she made the statement to her husband with the detectives present.

The argument that the request for an attorney on December 15 effectively foreclosed the legality of the activity on December 27 and 28 is not compelling. A series of cases have held that even though an attorney is once requested or retained the right to an attorney

can be subequently waived. United States v. Hodge, 487 F.2d 945 (5th Cir. 1973); United States v. Dority, 487 F.2d 846 (6th Cir. 1973); United States v. Springer, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873, 93 S.Ct. 205, 34 L.Ed.2d 125 (1972); United States v. Brown, 459 F.2d 319 (5th Cir. 1971), cert. denied, 409 U.S. 864, 93 S.Ct. 155, 34 L.Ed.2d 111 (1972); United States v. Green, 433 F.2d 946 (5th Cir. 1970); Wilson v. United States, 398 F.2d 331 (5th Cir. 1968), cert. denied, 393 U.S. 1069, 89 S.Ct. 727, 21 L.Ed.2d 712 (1969); Coughlan v. United States, 391 F.2d 371 (9th Cir.), cert. denied, 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968).

It appears from the facts of each case relied upon by the petitioner that, even though an attorney was requested, the defendants were not permitted the opportunity to exercise their right to consult with an attorney. United States v. Blair, 470 F.2d 331 (5th Cir. 1972), cert. denied, Crews v. United States, 411 U.S. 908, 93 S.Ct. 1536, 36 L.Ed.2d 197 (1973); United States v. Priest, 409 F.2d 491 (5th Cir. 1969); United States v. Slaughter, 366 F.2d 833 (4th Cir. 1966). In the instant case, however, the petitioner was given the opportunity to consult with her attorney when requested. Even after consulting with her attorney she was free to remain silent and to have her attorney present during any interrogation. Having full knowledge of these rights, she could knowingly and voluntarily waive them on December 27. *Cf.* United States v. Brown, *supra;* United States v. Daulton, 488 F.2d 524 (5th Cir. 1973), cert. denied, 416 U.S. 989, 94 S.Ct. 2396, 40 L.Ed.2d 767 (1974). The district court was not clearly erroneous in finding that she did, in fact, waive those rights.

[7] The fourth issue as to *Miranda* is stated in the appellant's brief as follows:

> Whether *any* form of warning given on the morning of December 27, 1970, could comport with the requirements of *Miranda* when the police officer who claims to have given the warning, induces the damaging statements, after the appellant's attorney (obtained for appellant by her husband) left the police station because of his illness, and before the arrival of a second attorney known by police to be on his way to represent appellant, and whether said damaging statements elicited on December 27, 1970, can be admitted against her at her state trial.

The cases heretofore cited clearly indicate that the above issue must be resolved against the petitioner. A person may voluntarily speak without an attorney present, even though he knows one to be on the way upon request, if the police actions are not compelling. There is some question as to whether the activity between the police and the petitioner fall within the realm of "interrogation" as envisaged by *Miranda*, but even assuming the fact, with the husband present, and the knowledge that she need not speak until her attorney arrives, there is no legal impediment to voluntary statements.

[8] The last issue posed by appellant's brief in connection with the *Miranda* issue is this:

> Whether damaging admissions and conduct of appellant, induced by the police without any *Miranda* warning on the morning of December 28, 1970, after her arrest and when the police were specifically told by appellant's counsel that they were not to further question her can be admitted in evidence against her at her state trial.

The facts and law again resolve this issue against petitioner. She was positively told more than once on the

morning of December 28 that she did not have to make the trip to the reservoir if she did not want to. She insisted that this is what she wanted to do. With full knowledge of her rights and the additional admonition that she need not go, there was no legal impediment to waiving those rights and making the trip. Having done so voluntarily, the conduct could be used at her trial.

Outside of the specific points raised by the petition, we have viewed the overall conduct of the police to see if we could sense unfair conduct that might, although technically correct, nevertheless indicate a pattern that is contrary to the spirit of the Fifth and Sixth Amendments and the progeny of *Miranda*. With this overview, we do not have the deep and abiding conviction necessary for a finding that the district court was clearly erroneous in its findings and conclusions of law.

The second major point raised by petitioner on appeal concerns four photographs, taken during the second autopsy, of physical sections of Mona Biddy's body. The first autopsy had been performed within hours after the discovery of Mona Biddy's body. During the first trial of this cause, which ended in a mistrial, the defense interposed a theory that the death of the child had been caused by laryngeal edema resulting from the ingestion of a caustic solution known as Liquid Plumr, a household drain cleaner. Between the first and second trial, the child's body was exhumed and a second autopsy performed, during which the neck organs were removed, placed in a preservative, and subsequently photographed in the laboratory. From the neck organs themselves certain microscopic slides were made and these, along with the paraffin blocks used in preparing the sections and the neck organs themselves, were turned over to the defendant's medical expert. Although

the prosecutor was under a court order to turn over all medical data to the petitioner, the film from which the photographs were made was turned over to the Jackson Police Detective Bureau for developing. The state's medical witness could not recall whether he saw the photographs after their development.

At the second trial, the four photographs were admitted into evidence without objection, after defendant's attorney stated that he had not seen them before trial and asked for a brief recess. A five minute recess was taken. The defense's experts testified that they could not determine the cause of death of the child from the information contained in the autopsy report or in these photographs.

Petitioner's medical experts now say, and they so testified before the district court, that they can state with a reasonable degree of medical probability that the cause of death of Mona Biddy was the ingestion of Liquid Plumr, rather than strangulation or suffocation. These opinions were arrived at after reconsidering the photographs.

These photographs raise two problems, one of which we consider here, and one of which we do not.

[9, 10] To the extent that the argument is based on Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and a theory of state suppression of exculpatory evidence, we find no merit to the petitioner's contention, and affirm the district court's ruling. The state had no experts who would testify that the photographs revealed any doubt as to the cause of death, and there was, in fact, no suppression of evidence. The photographs were introduced at trial without objection, and there is no indication that the de-

fense could not have had its experts take as much time as they needed to study the photographs during the trial. The case simply does not fall within the *Brady* proscription of evidence suppression. *See, e. g.*, United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971), cert. denied, Woodard v. United States, 405 U.S. 931, 92 S.Ct. 987, 30 L.Ed.2d 806 (1972); United States v. Moore, 439 F.2d 1107, 1108 (6th Cir. 1971); United States v. Evanchik, 413 F.2d 950, 952-953 (2d Cir. 1969); United States v. Jordan, 399 F.2d 610 (2nd Cir.), cert. denied, 393 U.S. 1005, 89 S.Ct. 496, 21 L.Ed.2d 469 (1968). Furthermore, the failure to produce the photographs pursuant to the discovery order of the state court, even if error as a state procedural matter, does not rise to a constitutional level. *See, e.g.*, Woodward v. Beto, 447 F.2d 103, 105 (5th Cir.), cert. denied, 404 U.S. 957, 92 S.Ct. 325, 30 L.Ed.2d 275 (1971).

[11] The other prong of defendant's argument is not subject to review in a federal court because it has never been presented to a state court. The argument is that with these photographs and the new opinions of the expert defense witnesses, it now appears that the defendant is armed with evidence that no crime was ever committed. This is in the nature of newly discovered evidence. The point has not been presented to the state court, so that it cannot properly be reviewed by a federal court at this time. To the extent that the district court judgment may have passed upon this question, it is modified. *Cf.* Ross v. State of Texas, 474 F.2d 1150 (5th Cir.), cert. denied, 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed.2d 98 (1973).

Affirmed.

APPENDIX E

Appellant's Statement of December 27, 1970

They were sitting facing each other, holding hands. She looked straight at Mr. Biddy, and said "Ted, I am sorry I did it." She said "Ted, I didn't mean to do it." And she broke down. She stopped what she was going to say.

Then she continued and went through the story about what she said had taken place. She said that on this particular night, December the 2nd, Mona had gotten ahold of Liquid Plumr, at about seven:thirty, and drank some out in the storeroom, and it made her violently ill. It made her vomit.

She tried to feed her, and she couldn't eat. She called the doctor and asked him what to do, and he said that if her mouth was not burned, and turning kind of white, that she was not seriously hurt, and to give her something to settle her stomach.

She said then Mona went to bed at about eight: thirty. She went to bed in the room with Lee Ann, which is Mrs. Biddy's daughter, and Mr. Biddy's stepdaughter. Usually one of the little boys sleeps in this room, but for some reason they changed, and Lee Ann was to occupy the room with Mona.

She said that Mr. Biddy went to bed shortly after that, and she stayed up and watched television with her son Rocky, who is ten or eleven years old. He was studying, and she was watching T. V.

Around ten, I believe, Rocky went to bed, and at ten: thirty, she said, she started to go to bed, and she said she went by Mona's room to look in on her. She said she found her—she said 'scooted down the bed', with the

bed clothing wrapped around her head.

She said she unwrapped the bed clothing and couldn't get any response from Mona. She said this frightened her, and she picked Mona up and took her out to the den, and laid her down on the couch. She said she just flopped down.

She said she started to call Ted, but she was afraid that people would think that she had something to do with it; that she had realized she was dead, and she was afraid to call Ted, she said.

She started to call a doctor, and she just decided to get rid of the body, and take the body so they wouldn't blame her with it. She carried her out and put her in her car and drove to the reservoir.

She drove to a particular spot near the Lakeview Marina, because she and Ted had spent a lot of time out there in the past. She said she put the body down near the bank, kissed it on the forehead, and left it there so it would be found, and then she came back home.

She said the next day, the next morning, she got up and fixed breakfast. She asked her children to wake up everybody. She said one of the boys—I'm not sure which one—Jimmy, I believe, went into the room—in fact I know it was Jimmy.

He went into the room, because that's where he usually slept, to get his clothing, and he told her that Mona was not in the room, and at that time, she said, she looked and saw the door to the carport partly open from the kitchen to the carport, or the den, and she notified Ted, and they began an immediate search for Mona.

That's the story she told us at that time.

. . . .

Q. Let me first ask you one other question: Who was present during the time she was talking to you?

A. Lieutenant Price, myself, and Mr. Biddy.

APPENDIX F

Defendant's Statement of December 28, 1970

Q. All right. The next day, December the 28th—

A. The next day, December the 28th, Lieutenant Price and I, and Nancy McAleer from the Juvenile Department went up to the jail to talk to Mrs. Biddy, and asked her did she still want to go out and show us where she took the body of Mona.

She said she would. We went downstairs to our car, and as we were getting into the car, I said 'Mrs. Biddy, you don't have to go it you don't want to.' She said 'I want to go.'

We got in the car and drove out Highway 55 North, toward Canton, turned in the direction of the reservoir, but just before we got on the reservoir road that goes over the dam, Lieutenant Price was driving.

He said, 'now, Mrs. Biddy, we want you to tell us every turn to take. We are not going to turn in any direction, unless you direct us to.' From that point on, she told us where to go.

We went on across the dam to a blacktop road that turned to the left. She said, turn here. We went up and she told us to turn in a gravel road. We turned in there and after getting in this particular section, she said 'that doesn't look like the place'.

I said 'all right, tell us where to go.' She directed us to turn around, and we came back out, went back north on this blacktop road, until we came to the Lakeview Marina road. We turned in there, went on around by the old Captain's Table, the place that had been a fish house, a place to eat, and had burned some months before. She stopped us at this point, said 'this looks like the place'. We got out and walked down to the water's edge, and she said 'this is the place'. At this particular spot there was an eight-foot moon-shaped cutout in the bank.

Q. I'll hand you State's Exhibit '18-t'. I want you to look at this and tell us what this is.

A. Yes sir, this is it. This is the spot.

Q. Show to the jury what you're talking about.

A. (Witness does as requested.) This cutout is the point, the spot she pointed out, right here. (Indicating.) This cutout right here is about eight feet across, and it's about a five-foot drop. She pointed to this spot, and said 'this is where I brought Mona'. She kissed her on the forehead and laid her down. We asked her 'in which direction did you place the head', she said—she pointed in the direction of the east, which would be on the picture this way. (Indicating.) She identified this place as being the spot she took the body to.

She became a little emotional, and we took her back to the office, and waited with her a few minutes, and Mr. Poole, and Mr. Biddy, I believe, and some other member of the family arrived, and we turned her over to them.

Q. And this place on State's Exhibit '18-t' is the same place where the body was found?

A. Yes sir. This is the exact spot.

Q. All right. How many miles is it from the defendant's home on Lynnwood Lane to the point where this body was found?

A. Of the two principal roads, the principal ways to go, one way it's thirteen five-tenths miles, and the other way it's thirteen three-tenths miles.

Q. Approximately thirteen miles?

A. Yes sir.

Q. All right. After you all came back then what happened, if anything?

A. Mr. Poole, we let him have a conference with Mrs. Biddy, and after he was finished, she was placed back in jail.

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1006

CAROLEE BIDDY,
Petitioner,

vs.

FRED DIAMOND, SHERIFF, JACKSON COUNTY JAIL, and JACK REED, WARDEN OF THE MISSISSIPPI STATE PENITENTIARY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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In The

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Mississippi Supreme Court is reported as *Biddy* v. *State*, 277 So.2d 115 (Miss. 1973). The opinion of the Court of Appeals for the Fifth Circuit is reported as *Biddy* v. *Diamond*, 516 F.2d 118 (5th Cir. July 18, 1975).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioner, Carolee Biddy, was indicted by the Grand Jury of Hinds County, Mississippi, on April 22, 1971, for the crime of murdering her five-year-old mentally-retarded step-daughter, Mona Biddy. On March 22, 1971, Petitioner, by and through her attorneys, filed a motion for change of venue in view of the pre-trial publicity which had surrounded the death of the deceased, and on April 2, 1971, the Circuit Court of the First Judicial District of Hinds County, Mississippi, entered an order changing the venue to the Circuit Court of Jackson County, Mississippi.

Petitioner was tried in that court; however, a mistrial was declared when the jury was unable to agree on a verdict. Petitioner was re-tried in that court, and on September 5, 1972, the petit jury returned a verdict of guilty of manslaughter. For her crime, Petitioner was sentenced to serve a term of twenty years in the Mississippi State Penitentiary wherein she is presently incarcerated.

On January 8, 1973, the Supreme Court of Mississippi, by written opinion, affirmed Petitioner's conviction. A petition for rehearing was duly filed, and on February 26, 1973, the Supreme Court of Mississippi, by a written opinion wherein all the Judges concurred, denied the petition for re-hearing. The opinion of the Supreme Court of Mississippi and the opinion of the Court in denying the petition for re-hearing are reported as *Biddy* v. *State*, 277 So.2d 115 (Miss. 1973).

A petition for writ of certiorari was then filed in the Supreme Court of the United States. After reviewing the precise issue which is again presented here, the petition was denied on October 7, 1973. *Biddy* v. *Mississippi*, 414 U.S. 866, 38 L.Ed.2d 118, 94 S.Ct. 46, and on December 3, 1973 the Supreme Court denied the petition for rehearing. *Biddy* v. *Mississippi*, 414 U.S. 1087, 38 L.Ed.2d 493, 94 S.Ct. 610.

Petitioner then filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi pursuant to 28 U.S.C. §2241 et seq. Pursuant to that petition evidentiary hearings were conducted by the District Court on February 3, 1974, and on April 11, 1974.

On April 23, 1974, the District Court entered a written opinion denying the application for writ of habeas corpus. A copy of the opinion is attached to Petitioner's brief as Appendix C. A notice of appeal was filed and a certificate of probable cause was signed by the District Judge as required by 28 U.S.C. §2253.

On July 18, 1975 the United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court. A copy of the opinion is attached to Petitioner's brief as Appendix D.

STATEMENT OF THE FACTS

The facts of this case as reported in *Biddy* v. *Diamond*, 516 F.2d 118 (5th Cir. 1975) are correct and are adopted here. Where necessary, a more complete recitation of the factual situation appears in the argument.

ARGUMENT

Whether Appellant Knowingly Waived Her Right to Remain Silent and Her Right to the Presence of Her Attorney When She, After Twice Executing Waivers and Then Requested Her Attorney, Stated That She Understood Her Rights and Gave a Statement

The uncontradicted proof before this Court is that on December 15, 1970, Petitioner, a 32-year-old high school graduate who had worked as a secretary for an engineering firm, voluntarily went to Police Headquarters where she was advised of her rights; that her rights were then read to her; that she was questioned individually about each right and stated that she understood them; and that she signed a written waiver. [Reeves D.C. Tr. 194; Price 274-275; 2d Tr. 340, 351, 300, 366].

It is also uncontradicted that she volunteered to take a polygraph examination that afternoon; that her rights were again read to her; and that she signed another waiver.

The evidence before this Court also shows that she was not again questioned until December 27, 1970 [D.C. Tr. 200], on which day she was asked if she understood her rights and she replied that she did [(Reeves) D.C. Tr. 206-207, (Price) 280].

Assuming, but not admitting, the Petitioner was in custody or deprived of her freedom in a significant way on December 27, 1970, were further *Miranda* warnings required?

Perhaps this question is best answered by *People* v. *Hill*, 39 Ill.2d 125, 233 N.E.2d 367 (1968), wherein the court stated:

> "To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of standards envisioned by *Miranda*. *Gorman* v. *United States*, 380 F.2d 158, 164 (1st Cir.)."

Failure of police to repeat the *Miranda* warnings prior to the taking of the defendant's third and fourth "in custody" statements was assigned as error in *State* v. *Rowe*, 468 P.2d 100 (Wash. 1970). The court stated:

> "Defendant was properly informed of his rights at the time of his arrest and again before giving his first and second written statements. *Miranda* does not require the police to make repeated recitations of a defendant's constitutional rights before the taking of each subsequent statement. *State* v. *Blanchey*, 75 Wash. Dec.2d 935, 54 P.2d 841 (1969); *State* v. *Lucia*, 74 Wash.2d 819, 447 P.2d 606 (1968). Having been informed of his rights three times and having intelligently waived them, statements taken within the next 48 hours cannot be said to have been made without knowledge of his rights."

In *Miller* v. *United States*, 396 F.2d 492 (8th Cir. 1968), the court was faced with the issue of whether *Miranda* warnings must be given each time the interrogation process resumes. The court stated:

> "It is difficult to lay down a rule of general application, and we will not attempt to do so here. In each case the ultimate question is: Did the defendant, with a full knowledge of his legal rights, knowingly and intelligently relinquish them?" (396 F.2d at 496).

United States v. *Anthony*, 474 F.2d 470, 473 (5th Cir. 1973) held: "there is no requirement that an accused be continually reminded of his rights once he has intelligently waived them."

As stated by the First Circuit in *Gorman* v. *United States*, 380 F.2d 158, 164 (1st Cir. 1967):

> "In the first place, advocacy of an automatic second-warning system misunderstands and downgrades the warnings required by *Miranda*. Their purpose was not to add a perfunctory ritual to the police procedure but to be a set of procedural safeguards 'to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it. * * *' While the police interrogators must faithfully carry out *Miranda's* mandate at the threshold, they may then proceed to elicit responses, however incriminating, without further specific warnings."

Petitioner next urges that the effectiveness of the *Miranda* warnings dissipated during the twelve-day period between December 15 and December 27—that the December 15 warnings had become stale.

In *United States* v. *Kinsey*, 352 F.Supp. 1176 at 1178 (E.D. Penn. 1972), the court stated:

> "There is no requirement that the *Miranda* warnings be repeated immediately prior to the commencement of every interrogation session. They do not become 'stale': *Commonwealth* v. *Abrams*, 443 Pa. 295, 298-301, 278 A.2d 902 (1971)."

The Ohio Court in *State* v. *Gallagher*, 36 Ohio App.2d 29, 301 N.E.2d 888, 890 (1973), held:

> "The law is established that there is no requirement to repeat the warnings during subsequent questionings, even if several weeks elapse and further questioning is conducted by other persons."

Petitioner relies upon *Brown* v. *State*, 252 A.2d 272, 275 (Md. 1969), for the proposition that *Miranda* required that she be readvised of her rights on December 27, 1970. Even in that case the court stated:

> "We quite agree with the cases which hold that the *Miranda* warnings need not be given anew nor the *Miranda* waiver expressed each time the officers question the accused."

Petitioner also relies upon *People* v. *Schenk*, 24 Cal. App.3d 233, 101 Cal. Rptr. 75 (1972); however, the court stated:

> "[W]e hold that a repeated and continued warning need not precede every twist and turn in the investigatory phase of the criminal proceeding. Rather, as was stated in *People* v. *Brockman* (1969), 2 Cal. App.3d 1002, 1006, 83 Cal. Rptr. 70, 73: 'The determination, in each case, is whether the *Miranda* warning sufficiently informs a defendant of his constitutional rights so that he has an understanding of those rights during subsequent interrogations. [Citations.]' If the Record reflects that the defendant comprehended during subsequent interrogation the precedent *Miranda* warnings, the requirements of *Miranda* have been satisfied."

See also: *Maguire* v. *United States*, 396 F.2d 492 (9 Cir. 1968), cert. den. 393 U.S. 1099 (1969); *Tucker* v. *United States*, 375 F.2d 365 (8 Cir. 1967), cert. den.

389 U.S. 888 (1967); *State* v. *Magee*, 52 N.J. 352, 245 A.2d 339 (1968).

On two separate occasions on December 15, the Petitioner was advised of her rights and signed waiver forms. She was not questioned between that date and December 27, when she was told that she had been informed of her rights previously and asked if she understood them. She replied that she did. (D.C. Tr. 206).

On both dates the conversations were with the same officers, the conversations occurred in the same location, and the officers had made no attempt to dilute Petitioner's understanding or knowledge of her rights. At the evidentiary hearing below Petitioner was asked if she knew that she did not have to talk to the officers. She refused to give a direct answer but stated: "I don't think I really thought about it." (D.C. Tr. 185). The record clearly indicates the Petitioner had full knowledge of her rights and intelligently relinquished them.

What effect did Petitioner's December 15, 1970, request to have her lawyer have upon her December 27, 1970, statements? Petitioner contends the request "nullified" her prior unquestionably valid waivers, thereby rendering the December 27th statement inadmissible and in support of that contention relies upon the following statement from *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966):

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an *opportunity* to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent." (Emphasis added) 384 U.S. at 474, 16 L.Ed.2d at 723.

However, *Miranda* v. *Arizona*, *supra*, held that even if interrogation is continued after a request but without the presence of an attorney the statements might be admissible if the defendant knowingly and intelligently waived his privilege.

In *United States* v. *Green*, 433 F.2d 946, 948 (5th Cir. 1970), it was held:

> "Miranda did not hold that once an accused expresses a desire to have counsel present the door to present or future interrogation is forever closed. The right to have counsel present can be waived."

Cf. *United States* v. *Brown*, 459 F.2d 319 (5th Cir. 1971), cert. den. 409 U.S. 864, 93 S.Ct. 155, 34 L.Ed. 2d 111 (1972).

A waiver in *United States* v. *Green*, *supra*, was found under more suspect circumstances than exist in the instant case. Here, Petitioner was not under arrest at the time of any interrogation; in both cases the questioning ceased when a request for counsel was made; and in both cases the individual being questioned acknowledged awareness and understanding of his rights.

In *United States* v. *Appell*, 259 F.Supp. 156 (D. Mass. 1966), an officer advised the defendant to accompany him to his office where defendant was advised of his rights. The defendant called his attorney and

while waiting for the attorney to arrive gave damaging admissions. The Court found the defendant was aware of his rights and in fact executed them, and the statements made in the attorney's absence were admissible.

In *United States* v. *Hodge*, 487 F.2d 945 (5th Cir. 1973), the defendant was arrested and advised of his *Miranda* rights. He requested an attorney and the interrogation was terminated. After being advised of the procedure for obtaining counsel the defendant elected to give a statement after waiving his right to counsel. The defendant contended that once he requested counsel there could be no further interrogation. The Court held that the defendant's request for an attorney evidenced an understanding of his rights; that an arrestee could change his mind after requesting counsel; and that the defendant had voluntarily and freely waived the right. In the instant case the Petitioner evidenced her understanding of her rights by requesting her counsel; by noting that the law enforcement officers ceased their questioning when asked, and that the officers left her home when requested.

In *United States* v. *Dority*, 487 F.2d 846 (6th Cir. 1973), the defendant, after being advised of his rights by an FBI agent, stated that he did not want to make a statement but would like to consider it for a few days. Counsel was appointed and the agent, although he did not know of the appointment of counsel, readvised the defendant of his rights. The Court held that the agent was under no Constitutional duty to refrain from talking to the defendant out of the presence of his attorney since the defendant's right to have counsel present was waived by his act of signing the waiver.

In *Wilson* v. *United States*, 398 F.2d 331 (5 Cir. 1968), cert. den. 393 U.S. 1069, 89 S.Ct. 727, 21 L.Ed.2d 712 (1969), the arrested defendants after having counsel appointed and being advised of their rights, refused to give a statement. Later, law enforcement officers knowing that counsel had been appointed for the defendants, were able to obtain a statement. The defendants contended that since the officers knew counsel was appointed they were prohibited from interrogating them without the presence of their counsel. This Court rejected the argument by stating:

> "It appears without dispute that appellants made oral admissions to agents of the Federal Bureau of Investigation out of the presence of appellants' counsel, the agents knowing that counsel had been appointed for appellants. That fact alone will not in our opinion render inadmissible the admissions made, as held in Coughlan v. United States, 391 F.2d 371 (9 Cir. 1968)." (398 F.2d at 333).

The Ninth Circuit, in *Coughlan* v. *United States*, 391 F.2d 371 (9 Cir. 1968), cert. den. 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968), found that the defendant was interrogated in jail by officers who knew that he was represented by counsel. Defendant's counsel was not present at the interrogation and had no notice of it. The Court stated:

> "Under this state of the facts, appellant contends that his Constitutionally guaranteed right to counsel was effectively denied. We are asked to rule that any statement, admission or confession secured by peace officers from a defendant represented by an attorney, where the attorney was not

timely advised of the proposed interview or interrogation, be rejected as violative of the right to counsel. Appellant recognizes that this Sixth Amendment right may be voluntarily waived, but, at oral argument, it was contended that such a waiver would never be knowingly and truly voluntary unless counsel was present to advise the client.

It may well be that the day is approaching when the right to counsel may be expanded to the point where an accused may only be interrogated by the police in the presence of his lawyer. However, no persuasive precedent for the holding here sought has come to our attention. Appellant relies heavily on the teaching of Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). Miranda specifically recognizes prior cases holding that the right to counsel may be waived. Here a clear and knowing waiver was shown. We are unwilling to attempt to expand the Miranda ruling to the extent sought by appellant." (391 F.2d at 371).

In *United States* v. *Hale*, 397 F.2d 427 (7 Cir. 1968), the sheriff requested the defendant to follow him to his office, which the defendant did. An attorney was then appointed to represent him and the attorney talked with the defendant at length that day. The next day the attorney was told that FBI officers were coming to interrogate the defendant and the attorney advised the two officers that his client was prepared to cooperate. Although he did not inform the police officers to call him, it was his intention to be present at any interrogation and he assumed that he would be called. He had earlier told the defendant to *say nothing unless he were present.* The FBI agents

arrived, advised defendant of his rights and at that time the defendant made a statement out of the presence of his attorney. The Court found the admissions to be the product of a waiver and admissible into evidence.

In the instant case the Petitioner, her husband, and her attorneys cooperated with the police; however, her attorney never advised the police not to question his client unless he was present. The Seventh Circuit, in a leading case, *United States* v. *Springer,* 460 F.2d 1344 (7 Cir. 1972), cert. den. 407 U.S. 873, 93 S.Ct. 205, 34 L.Ed.2d 125 (1972), found that the government agents presented a signed waiver form to the defendant and that the defendant had stated that he understood his rights. The Court held that such was sufficient to raise a presumption of validity of waiver and shift the burden of going forward to the accused who must present some facts tending to show the waiver was not voluntary or knowledgeable. The Court also acknowledged that the fact that a defendant has an attorney does not mean, as per se rule, that law enforcement officers cannot procure a statement of any kind from defendant without prior notice to, if not the consent of, the attorney.

The facts in the instant case clearly show that Petitioner was aware of her Constitutional rights and effectively waived them. The Petitioner has failed to put on sufficient proof to show otherwise. In *United States* v. *Springer, supra,* the Court also held that a district court's determination that a defendant's oral and written confessions were given after waivers of *Miranda* rights is entitled to substantial deference and would not be overturned if it was substantially supported. The Supreme Court of Mississippi, the Federal District

Court and Fifth Circuit Court of Appeals have, after considering the evidence, found the statements were given after a voluntary and knowing waiver. The findings of those Courts are substantiated by the Record and their decisions should not be overturned.

In *Dillon* v. *United States,* 391 F.2d 433 (10 Cir. 1968), the defendant, at the request of the city police, went to the police station and was placed in an interview where he was interrogated by agents of the FBI who also advised him of the charges pending against him and his Constitutional rights.

In *Dillon* v. *United States, supra,* the Court stated:

> "It is further contended by Dillon that after counsel had been retained for him the FBI agent interviewed him without his counsel being present and this procedure tainted the admissions. We do not agree. The fact that Dillon's counsel was not present at the time the admissions were confirmed does not ipso facto render them inadmissible. Butterwood v. United States, supra, at 383 of 365 F.2d. The presence of counsel can be waived as well as demanded. Certainly, if an accused can waive the right to counsel when that right first attaches, Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942); Leighton v. Cox, 365 F.2d 122 (10 Cir. 1966), he can waive the right to have counsel present subsequent to the counsel's appointment or retainment. The chief concern in each case is that the waiver be intelligently made."

Petitioner relies primarily upon *United States* v. *Slaughter,* 366 F.2d 833 (4 Cir. 1966), and *United States* v. *Priest,* 409 F.2d 491 (5 Cir. 1969). In each

of those cases the Court looked to the statement in *Miranda* that:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the settling of in-custody and interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. *At that time, the individual must have an opportunity to confer with the attorney and have him present during any subsequent questioning.*" (Emphasis added) (384 U.S. at 473-474, 86 S.Ct. at 1627-1628, 16 L.Ed.2d 723).

Miranda, supra, and its progeny do require that if an individual requests counsel while he is undergoing custodial interrogation the interrogation must cease. In the cases relied upon must heavily by the Petitioner, the defendants did, in fact, request the assistance of counsel and none was provided. Their statements were taken without ever seeing or discussing the matter with an attorney. However, the authorities do not require that a defendant in fact talk or consult with an attorney. The last portion of the above quoted statement in *Miranda, supra,* provides that the defendant must have an "opportunity" to consult with an

attorney—it does not require him to do so. In the cases relied upon most heavily by Petitioner the defendants were not permitted the opportunity to exercise their right.

In the instant case the Petitioner did in fact request an attorney after taking the polygraph examination on December 15th. The important factor is that she was then given the opportunity to consult with her attorney and in fact she went to her home where she was met by her attorney.

After consulting with her attorney the Petitioner was once again free to remain silent and to say nothing without the presence of her attorney. Having full knowledge of those rights she knowingly and voluntarily waived them on December 27th.

In *United States* v. *Daulton*, 488 F.2d 524 (5 Cir. 1973), cert. den. 416 U.S. 989, 94 S.Ct. 2396, 40 L.Ed.2d 767 (1974), it was contended that the confession admitted at trial was obtained in violation of Daulton's *Miranda* rights. A full advisory was given at the first interview on December 26, 1972, at which time he chose to say nothing. Thirteen days later, Daulton sent for the government agents so he could tell them his side of the story. At that time a second advisory was given which failed to include notification of the right to appointed counsel if he could not afford one. Affirming Daulton's conviction, this Court observed:

> "The second warning was given by the same interviewing officer who had first given the Miranda warnings in a full and complete form. There was further evidence that prior to his confession the appellant had a conversation with the prison warden

> in which he stated his awareness of his entitlement to an attorney. In this situation, having been given the full warning on an occasion when he declined to talk, and being aware of his entitlement to counsel, we attribute no reversible significance to the inadvertent omission of a portion of the warning on the second occasion. See United States v. Springer, 7 Cir. 1972, 460 F.2d 1344; United States v. Hopkins, 5 Cir., 1970, 433 F.2d 1041; Maguire v. United States, 9 Cir. 1968, 396 F.2d 327. The fact that Daulton requested the second interview and was warned by identically the same man who had previously warned him, negates any idea of involuntariness generated by failure to mention a fact already known to the prisoner." (488 F.2d 524 at 525).

On December 15, 1970, Petitioner was fully and completely advised of her Constitutional rights and signed a written waiver and later that same day was again advised and signed a second waiver. On December 27, 1970, the Petitioner was requested to go to the police station where she was told that she had been informed of her rights before and was asked if she remembered and understood them to which she replied affirmatively. On both the 15th of December and the 27th of December, the Petitioner was advised and reminded of her rights by the same officers in the same location. The officers had done nothing to dilute the effect of the warnings previously given. Under such circumstances the Petitioner knowingly and voluntarily waived her right to remain silent. The fact she, on the evening of December 15, 1970, had requested and obtained the presence of her counsel is the clearest evidence that she understood her rights and could invoke them at will. See: *United States* v. *Hodge*, 487 F.2d 945 (5 Cir. 1973).

It is also important to note that when the Petitioner was advised of her rights for the second time on December 15, 1970, she stated that they had previously been explained to her and she knew what her rights were. (2d Tr. 206) (D.C. Tr. 76).

When the Petitioner gave her statement on December 27, 1970, and before Attorney Poole arrived at the police station, Reeves and Price asked her if she would go to the Ross Barnett Reservoir and point out the spot where she had left her stepdaughter's body. She stated: "She said she'd be glad to." (2d Tr. 296). And, she agreed to show them the location the next morning. The next morning, December 28, Reeves went to the jail and asked the Petitioner if she still wanted to carry them to the Reservoir. She replied affirmatively, stated that she had told the truth, and stated that she wanted to get it all straight. (2d Tr. 297). At the hearing below Reeves testified that he told Petitioner on two occasions on the morning of the 28th that she did not have to go to the Reservoir and show them where she had placed her stepdaughter's body. She stated that she wanted to get the matter cleared up. (D.C. Tr. 213-215). Price also testified at the evidentiary hearing below that Petitioner was advised that she did not have to go to the Reservoir if she did not desire to do so. (D.C. Tr. 284). On the morning of December 28, 1970, policewoman Nancy McAleer was requested to accompany Reeves and Price and the Petitioner. At the hearing below she testified that on that morning Petitioner applied her makeup, brushed her hair and indicated that she was ready to go. McAleer testified that Reeves said: "Mrs. Biddy, you know you don't have to do this, and she replied that she wanted to get everything straightened out." The statement was made before they got into the automobile and, after they got

into the automobile Reeves again told Petitioner that she did not have to go. (D.C. Tr. 268, 269).

After Petitioner had given her statement on December 27th and agreed to accompany Reeves and Price to the Reservoir to show them where she had placed the body of her stepdaughter, Attorney Poole arrived and informed the Petitioner not to sign a statement. Reeves testified that Poole only told the Petitioner not to "sign" anything. (D.C. Tr. 244). Petitioner's only testimony was that Poole had told her not to "sign" anything. (D.C. Tr. 153).

Petitioner argues that later that night and before they went to the Reservoir the next morning Reeves and Price attempted to demean Attorney Poole in an effort to subvert her trust in her attorney. This contention is clearly not supported by the record. (D.C. Tr. 154-156, 217, 250-251).

Petitioner alleges that she was taken to the location where her stepdaughter was found even though Reeves and Price knew Attorney Poole had told her not to sign anything. It must be emphasized that the right to counsel and the right to remain silent are personal rights which can be invoked or waived solely by Petitioner—not her husband or attorney. In *Jordan* v. *United States*, 421 F.2d 493 (9 Cir. 1970), the defendant's attorney had advised him not to discuss the case with the law enforcement authorities. The Court found that the defendant had been advised of his rights and willingly made the statement which was his privilege. The Court also stated:

> "It is argued by appellant that because he did not make any recorded response to the warning and because his attorney was not present at any of these interviews he could not and did not make any affirmative waiver. We are not referred to any author-

ity in support of such proposition, and know of none."

An overview of the facts in this case clearly indicates Petitioner was at all times aware of her Constitutional rights and that she knowingly, voluntarily, and intelligently elected to waive her right to remain silent. Her statement was freely given with full knowledge of the consequences.

From December 4th to the 15th the officers saw the Biddys every day. "In fact, several times we saw them several times a day. Many times at their request, especially Mr. Biddy and sometimes Mrs. Biddy." The Biddys were very friendly toward these officers; "she welcomed us to her home, she asked us questions. Mr. Biddy was very friendly. We felt at home there." (D.C. Tr. 190).

Ted Biddy told the officers he thought his daughter had been kidnapped by a maniac. (D.C. Tr. 191).

On December 8, 1970, the body of the missing child was found in a reservoir. Mr. Biddy came to the scene and identified the body. On the 14th he called Officer Reeves and asked if Mona was wearing leotards when she was found. Reeves testified, "Her legs were real white, and it did look like she had on some white leotards. I told him that she did not, she had on a dress, an undershirt and panties. He said wait a minute, now there's something wrong because Mona never wore undershirts. He said somebody had kidnapped her and they changed her clothes. That undershirt doesn't belong to this family." (D.C. Tr. 191).

Consequently, on the 15th, the officers called Mrs. Biddy and asked her to come to headquarters and identify

the clothing. Both appellant and her husband went to headquarters and upon seeing the undershirt recognized it as a pajama top which they stated was, in fact, part of their children's clothing. (D.C. Tr. 192).

The officers then asked the Biddys if they could talk to them and the Biddys agreed.

Appellant, Officers Reeves and Price and the County Attorney from Rankin County (where the child's body had been found) went into an interrogation room which is the only facility available in the building for the interviewing of witnesses. At this time Petitioner was given a *Miranda* advisory. She was asked if she understood that and replied that ". . . she understood exactly what we were talking about." She then read and signed the waiver and the officers and county attorney placed their signatures on the waiver. (D.C. Tr. 194).

Describing this event, Petitioner testified:

By Mr. Hancock:

Q: Were you in custody at that time?

A: No. (Emphasis supplied).

Q: Did they advise you of your rights at that time?

A: They read my rights, yes.

Q: Did you sign a written waiver?

A: Yes, I did.

* * *

By Mr. Hancock:

Q: After you had signed this waiver and the police officers had, were no longer questioning you, were you allowed to go, to leave the headquarters?

A: Yes, I did. (D.C. Tr. 166).

Petitioner was alert and there was no question but that she understood her rights as explained.

Later that afternoon the Biddys were asked to take a polygraph exam and drove to the Highway Patrol building in their own car. Ted Biddy offered to take the polygraph test first and was introduced to Dewey Weems who was to administer the test. On direct examination at the district court hearing he testified:

Q: And were your rights explained to you prior to the time that the test was given?

A: Yes, sir. They were. (D.C. Tr. 80).

By the Court:

Did Mr. Biddy pass his test all right?

By the Witness:

No, sir.

By the Court:

Sir?

By the Witness:

He did not pass.

By the Court:

Both of them flunked the test?

By the Witness:

Yes, sir. (D.C. Tr. 68).

There was never any question but that appellant would be tested next (D.C. Tr. 65) and Weems explained her *Miranda* rights to her.

Q: And I believe you testified that you did have her sign a written waiver?

A: *That's correct.*

Q. Did she make any statement in regards to understanding her rights?

A: Yes, sir. When I asked her to read and if she understood to sign this waiver of her rights, her being entitled to a lawyer and her right to remain silent, *she made the statement that she knew what her rights were.* That the police officers had explained her rights to her and that she had an attorney. (D.C. Tr. 76) (Emphasis supplied).

Two polygrams were then run which revealed discrepancies in her story.

By Mr. Weems:

A: I was explaining the polygrams to her and the discrepancies in it and she made the request that she wanted to speak with her attorney.

Q: What did you do at that point?

A: I immediately stopped the examination, took the attachments off of Mrs. Biddy, asked her to get her coat off of the coat rack in the corner, and escorted her back out of the examination room. (D.C. Tr. 76).

Petitioner was then taken to her husband who telephoned Charles Wright, an attorney. (D.C. Tr. 36, 81, 117). Ted Biddy told the officers something was wrong with the test and asked the officers to come to his house and discuss it. The officers declined but Biddy insisted and the officers agreed to come out there later on. (D.C. Tr. 198).

Thereafter, the officers did meet Charles Wright at the Biddy home. Mrs. Biddy was not in the room. There was some discussion of the polygraph test between Ted Biddy and the officers.

By Mr. Hancock:

Q: Who was doing the questioning?

A: Mr. Biddy was asking the questions and the detectives were replying to him.

Q: By detectives you mean Reeves and Price?

A: Yes, that is correct.

Q: Was Carolee Biddy present?

A: At a time later after the initial discussion started.

Q: Was she present during at least part of the discussion concerning the lie detector test?

A: Yes, she was.

* * *

Q: What brought this conversation concerning the lie detector test to an end?

A: I assume I did because when I said that, that this is not the time or the place for this the *detectives immediately got up, agreed and left the premises.*

Q: *Were they hesitant about leaving?*

A: No.

Q: *Did they insist on questioning Carolee Biddy?*

A: *No.* (D.C. Tr. 51, 52) (Emphasis supplied).

Parenthetically, it should be noted at this point that on the evening of December 16, Petitioner reported a

stabbing incident in which she claimed an unidentified attacker had stabbed her. The Biddys called Officer Reeves to come to their house after the attack and they talked briefly about the attack but nothing else. No questions were asked concerning the disappearance of Mona. (D.C. Tr. 200). Reeves did not talk to Petitioner again until December 26 when he received a midnight phone call from Ted Biddy reporting that their two-year-old baby had been kidnapped and found outside. (D.C. Tr. 200, 201).

Early the next morning, Reeves and Price went to the Biddy home to look for clues relative to the incident the night before and were told by Mr. Biddy that he was taking his entire family to Georgia that day. The officers asked Mr. Biddy to call them before leaving and when he did they told him they felt they needed to talk to him. They went to his house and asked if he and Mrs. Biddy would come to headquarters to talk and Mrs. Biddy asked if it were necessary that she go. "She said all right she would go and then Mrs. Biddy's mother was there and said how long will they be gone? I said I don't think it will be long." The officers told the Biddys to go in their own car so the officers would not have to bring them back. (D.C. Tr. 204). No one was under arrest.

Upon arrival at the station the Biddys were placed in separate interrogation rooms and the officers told Ted Biddy of the results of their investigation thus far, i.e., that they believed the stabbing and kidnapping instances had been staged and that some things she had previously told them did not check out and he agreed and asked to speak to her. (D.C. Tr. 205).

Ted Biddy and Officer Price brought Petitioner across the hall into the interrogation room; Mr. Biddy

asked her about one of the incidences and about that time the phone rang and Reeves was told Charles Wright was downstairs. Reeves left the room and returned with Wright who was joined by Ted Biddy. (D.C. Tr. 90, 206).

Here it is worthy of emphasis that at the district court hearing, Wright testified he did not recall talking to Petitioner during the interval between the December 15 meeting and December 28th (D.C. Tr. 54) on which date he received a telephone call from Mal Sims asking him to go to police headquarters. (D.C. Tr. 39).

While these two men conversed Reeves returned to the interrogation room and told Petitioner ". . . there is a possibility that we will want to talk to you a little later. Do you remember and understand the rights that we have given you before?" She said that she did. He was satisfied she knew her rights as she was a normal, intelligent woman who had twice before been given complete advisorys and had previously successfully exercised her privilege of calling her attorney. (D.C. Tr. 206, 207).

When Wright left he told Reeves he was ill and would send John Poole in his place. Wright never told either Petitioner or her husband not to answer any questions. (D.C. Tr. 57).

Reeves testified he did not know if Petitioner ever saw Wright. After Wright left Reeves returned to the interrogation room. Ted Biddy asked his wife about some of the incidents and she admitted that these stories were not the truth. (D.C. Tr. 175).

Reeves then said, "Mrs. Biddy, why don't you tell him if you had anything to do with Mona's disappearance."

> She looked at him and had him by the hands and she said, Ted, I'm sorry, I didn't mean to do it. It floored me when I heard it. I wasn't expecting it, and then both of them cried and then stopped and she went on and told the story about finding the baby dead in bed and being afraid she would be accused of having something to do with the death and she took it out to the reservoir and put it at a place where they used to go when they were courting. (D.C. Tr. 209).

Reeves then asked if Petitioner "would mind" him taking her statement in writing. She agreed and shortly after Reeves began typing her statement he received a call that John Poole was downstairs. Reeves brought him upstairs and Poole and the Biddys conferred privately (2d Tr. 295, D.C. Tr.) after which Poole told the officers he did not want her signing any statement and left. Poole told the officers and the Biddys he would return the next morning.

Neither of the officers ever attempted in any way to prevent Petitioner from seeing either of the attorneys (2d Tr. 296, 346-357) nor did she or her husband tell the officers she did not wish to talk to them. (2d Tr. 338, 348).

After conferring with Chief of Police Tullos, appellant was arrested for the murder of Mona Biddy. (2d Tr. 458-459).

On the morning of December 28, the officers asked Petitioner if she would accompany them to the reservoir

as she had agreed the day before (prior to Poole's arrival) to show them where she placed the body. Twice they told her she did not have to go but she stated she had told the truth and wanted to get it straight. (2d Tr. 297). At the district court hearing Petitioner testified:

> Q: What happened on the morning of December 28, 1970? I believe that's the morning you went out to the reservoir.
>
> A: They came that morning, got me out of my cell and took me to the reservoir.
>
> Q: Were you told that you did not have to go?
>
> A: Yes, I was.
>
> Q: Why did you go?
>
> A: Because they said if I cooperated with them they would help me.
>
> Q: Did you have anything to hide?
>
> A: No.
>
> Q: Did you know that you did not have to go to the reservoir with them?
>
> A: Lieutenant Reeves said, you know you don't have to go, but, I was already in the car and I went. (D.C. Tr. 182).

Is *Miranda* applicable here? Was she in custody when her statements were made?

The Fifth Circuit has held that probable cause for arrest, the subjective intent of the police, subjective belief of the defendant and focus of the investigation are only factors to consider in determining whether there were present the compulsive factors with which

Miranda was concerned. *United States* v. *Carolla*, 507 F.2d 50 (1975), cert. den. .... U.S. ...., ... S.Ct. ...., 46 L.Ed.2d 105 (1975).

United States v. *Montos*, 421 F.2d 215 (5 Cir. 1970), cert. den. 397 U.S. 1022, 90 S.Ct. 1262, 25 L.Ed.2d 532 discussed the compulsive factors as follows:

> "The 'salient factors' of the cases decided in Miranda were 'incommunicado interrogation of individuals in a police-dominated atmosphere.' Miranda v. Arizona, 384 U.S. 436, 445, 86 S.Ct. 1602 (1966). The Miranda procedures are intended to combat the effect which such a 'compelling atmosphere,' *id.* at 478, 86 S.Ct. at 1630, has upon the exercise of constitutional rights. They are meant to preclude law enforcement personnel from performing 'their traditional investigatory functions,' *id.* at 481, 86 S.Ct. at 1631, such as '[g]eneral on-the-scene questioning of citizens in the fact finding process * * *.' *id.* at 477, 86 S.Ct. at 1629. Unless restraint of an individual by law enforcement personnel is 'significant' Miranda warnings are not required." (421 F.2d at 222).

The Fifth Circuit has also held that a defendant is not in custody within the purview of *Miranda* when he, at the request of an officer, appears and subjects himself to questioning at the office of a law enforcement officer. *Menendez* v. *United States*, 393 F.2d 312 (5 Cir. 1968), cert. den. 393 U.S. 1029, 89 S.Ct. 639, 21 L.Ed.2d 572.

In *United States* v. *Hall*, 421 F.2d 540 (2 Cir. 1969), cert. denied, 397 U.S. 990, 25 L.Ed.2d 398, 90 S.Ct. 1123 (1970), the Court held that Miranda warn-

ings need not be given prior to questioning even if the questioning is not conducted while the defendant is in custody.

In *Hicks* v. *United States*, 382 F.2d 158 (D.C. Cir. 1967), the police considered the defendant a suspect and carried him to police headquarters. The Court rejected the defendant's contention that she thought she was under arrest and concluded, among other things, that the detectives needed to have transcribing facilities available which were located at headquarters. The Court held that the detective's statement that he "wanted" her to come to headquarters rather than "requesting" or "inviting" her did not alter the situation. The Court noted "there were none of the familiar concomitants of arrest, e.g., searching, booking, fingerprinting, to negate the statement of police that Appellant was simply being interrogated as an important witness." 382 F.2d at 162. The Court also noted that "the investigation here was not initiated by the police but came after Appellant voluntarily reported a homicide; Appellant, not police, set the inquiry in motion." There was no "custodial interrogation" in the *Miranda* sense. Questioning of a witness cannot be characterized as "custodial interrogation simply because it occurs at the police station." 382 F.2d at 162. The Court further states:

> Nor is there anything in the record to indicate that appellant had been deprived of her freedom of action in any significant way; since she never attempted to leave the presence of the police it cannot be said that her presence at headquarters was against her will, especially as it is now clear that her conduct and very presence at the police station were part of her attempt to put the police on a

> wild goose chase in search of the mythical "jitterbug" attackers. (382 F.2d at 162).

In *United States* v. *Knight*, 261 F.Supp. 843 (E.D. Pa. 1966), an investigator advised Knight to come to the investigator's office for questioning. Knight went to the office where he was given an inadequate advisory of his rights. He was questioned about a crime for which he was suspect and gave damaging admissions. The Court held the questioning was not custodial interrogation as Knight was under no compulsion to go to the investigator's office and had been free to leave. The Court also found no evidence to support and rejected Knight's argument that he was in constructive custody since he voluntarily appeared at the office but did so under fear and similar psychological factors.

And, in *United State* v. *Littlepage*, 435 F.2d 498 (5 Cir. 1971), cert. den. 402 U.S. 915, 91 S.Ct. 1374, 28 L.Ed.2d 657, reh. den. 402 U.S. 1013, 91 S.Ct. 2187, 29 L.Ed.2d 436, the Fifth Circuit considered among other things in finding no custodial interrogation the fact that the defendant was not told he was under arrest.

Likewise, several courts have considered the presence of friends as an indication of non-custody. *Archer* v. *United States*, 393 F.2d 124 (5 Cir. 1968) (suspect's husband); *United States* v. *Manni*, 270 F.Supp. 103 (D. Mass. 1967), Aff'd. 391 F.2d 922 (1 Cir. 1968) (suspect's wife); *State* v. *Noriega*, 433 P.2d 281 (Ariz. App. 1967) (suspect's wife); *State* v. *Tellez*, 431 P.2d 691 (Ariz. App. 1967) (suspect's friends); *Stout* v. *State*, 426 S.W.2d 800 (Ark. 1968) (suspect's wife); *People* v. *Butterfield*, 65 Cal. Rptr. 876 (Cal. App. 1968) (sus-

pect's mother); *State* v. *Davis*, 157 N.W.2d 907 (Iowa 1968) (doctors and nurses); *Jones* v. *State*, 234 A.2d 900 (Md. App. 1967) (suspect's girl friend); *McFadden* v. *State*, 231 A.2d 910 (Md. App. 1967) (suspect's wife); *People* v. *Allen*, 281 N.Y.S.2d 602 (N.Y. App. 1967) (suspect's family); *State* v. *Gray*, 150 S.E.2d 1 (N.C. 1966) (suspect's cousin); *Commonwealth* v. *Barclay*, 240 A.2d 839 (Pa. App. 1968) (suspect's family).

Thus, on December 27, 1970, the date on which petitioner made her damaging admission, she was not subjected to custodial interrogation. She had voluntarily gone to the police station, she was under no compulsion to stay, she could have left at any time, and she was not required to answer any questions. Therefore, according to the cases cited above, there was no requirement that Petitioner be given her *Miranda* warnings. Statements given by her would be admissible in evidence without having been advised of her *Miranda* warnings and having knowingly and voluntarily waived them. Petitioner on two previous occasions had been advised of her *Miranda* rights and had signed waivers. Likewise, on the date in question the Petitioner was informed that she had been told her rights previously, and she was asked if she understood them, and she replied that she did. At the time she was not in the presence of her husband, but she had never been refused access to her attorney. She had voluntarily gone to the police headquarters with her husband. As shown by the facts, the police merely wanted to talk to Petitioner and her husband before they left the State of Mississippi. Under the circumstances there was no requirement that the *Miranda* warnings be given.

On the date in question, petitioner's husband was informed of statements made by the Petitioner which

the police believed to be false. The Petitioner's husband confronted her with these facts and she admitted that the statements she had been making in the past were false. In *People* v. *Sunday*, 79 Cal. Rptr. 752 at 756 (Cal. App. 1969), the Court stated:

> The entire thrust of the Miranda policy is to insure that a defendant's decision to confess or not is based upon a free and intelligent approval of his position. The appraisal may be better made if a defendant is aware of the nature and extent of evidence or information in the possession of the police.

As stated previously, petitioner had at least on two occasions been fully advised of her *Miranda* rights and had signed written waivers. Once *Miranda* warnings have been given, they need not be repeated prior to a second interrogation. *Maguire* v. *United States*, 396 F.2d 327 (9 Cir. 1968), cert. den. 393 U.S. 1099, 89 S.Ct. 897, 21 L.Ed.2d 792; *United States* v. *Osterburg*, 423 F.2d 704 (8 Cir. 1970), cert. den. 399 U.S. 914, 90 S.Ct. 2216, 26 L.Ed.2d 571; *United States* v. *Mansfield*, 318 F.2d 961 (7 Cir. 1967); *Miller* v. *United States*, 396 F.2d 492 (8 Cir. 1968), cert. den. 393 U.S. 1031, 89 S.Ct. 643, 21 L.Ed.2d 574.

It is well settled that whether *Miranda* warnings must be repeated before a second interrogation must be determined on a case by case method.

As stated in *Jennings* v. *United States*, 391 F.2d 512, 515 (5 Cir. 1968), cert. den. 393 U.S. 868, 21 L.Ed.2d 136, 89 S.Ct. 154 (1968):

> [W]hat the Court sought to interdict in Miranda were those situations in which the police had indicated a desire to exercise his constitutional right of

silence but the police refused to take 'no' for an answer.

As noted in *Boulden* v. *Holman*, 394 U.S. 478, 22 L.Ed.2d 433, 89 S.Ct. 1133 (1969):

> [T]he question whether a confession was voluntarily made necessarily turns on the 'totality of the circumstances' in any particular case. 394 U.S. at 487.

See also *Clewis* v. *Texas*, 386 U.S. 707, 18 L.Ed.2d 423, 87 S.Ct. 1338 (1967); *Greenwald* v. *Wisconsin*, 390 U.S. 519, 20 L.Ed.2d 77, 88 S.Ct. 1152 (1968); *Darwin* v. *Connecticut*, 391 U.S. 346, 20 L.Ed.2d 630, 88 S.Ct. 1488 (1968); *Frazier* v. *Cupp*, 394 U.S. 731, 22 L.Ed.2d 684, 89 S.Ct. 1420 (1969).

As submitted above there was no requirement that Petitioner at any time be advised of her *Miranda* rights; however, in the case at bar Petitioner signed two waivers and subsequently gave a verbal affirmation that the previously given admonitions were known and understood. There can be no doubt that the waiver was knowingly and unequivocally demonstrated.

Petitioner also alleges that after signing a waiver of *Miranda* rights on December 15, 1970, she had stated that she wanted her husband and attorney. At that time the uncontradicted evidence shows that the questioning ceased, and petitioner was free to do whatever she pleased. She and her husband returned to their home where they talked with their attorney. Petitioner now alleges that by requesting her attorneys she could not be questioned at a later date.

In *Dillon* v. *United States*, 391 F.2d 433 (10 Cir. 1968), cert. den. 393 U.S. 889, 89 S.Ct. 208, 21 L.Ed. 2d 168, the defendant was interviewed without the presence of his counsel and gave damaging admissions. The Court held that just as counsel may be waived when the right first attaches, the right may be waived subsequent to counsel's appearance.

In *United States* v. *Young*, 471 F.2d 109 (7 Cir. 1972), cert. den. 412 U.S. 929, 93 S.Ct. 2755, 37 L.Ed. 2d 156, the defendant was arrested by police officers and was advised of his rights. The defendant expressed a desire to talk to his attorney. He was later turned over to the postal authorities where he was again advised of his rights and signed a waiver and gave a statement. The Court held that there was no violation of *Miranda* as the defendant chose to speak rather than exercise his right to remain silent. In *United States* v. *Grady*, 423 F.2d 1091 (5 Cir. 1971), the defendant was arrested by city police and after being given his *Miranda* warnings stated that he would answer no questions and would like the assistance of counsel. Counsel was not furnished and on the next day defendant was interrogated by a special agent of the FBI at which time he made certain admissions. The defendant argued that the statements were inadmissible because he had expressed a desire for an attorney and was later questioned after making the request. The Fifth Circuit held that the statements were admissible and stated:

> A decision in appellant's favor on this point would be tantamount to holding that an arrestee could not change his mind once he had stated that he would not be interviewed without an attorney. (423 F.2d at 1093).

At no time was Petitioner denied access to an attorney. To the contrary, the evidence clearly indicates

that she was in constant contact with an attorney. Her admissions made on December 27, 1970, were not in violation of *Miranda* v. *Arizona*, *supra*. Immediately prior to giving the statements Petitioner admitted that she understood her rights.

Admittedly, Petitioner on December 15, 1970, stated that she wanted to see her lawyer and attorney. She was permitted to do so which in itself is a strong indication that anytime she expressed an interest in seeing an attorney there would be no questioning.

According to Petitioner's own evidence, her attorney knew that she would be interviewed on the date in question, and in fact, he appeared at the site of the interview.

In *United States* v. *Hayes*, 385 F.2d 375 (4 Cir. 1967), cert. den. 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106, the defendant was given the *Miranda* warnings and was permitted to make a telephone call, but was never asked if he understood the warnings or desired counsel, and he did not volunteer any information. He never confessed, but did make some incriminating statements during thirty minutes of questioning, which he suddenly terminated by declaring that he would answer no more questions and demanding that he be allowed to see a lawyer. The Court concluded his later assertion of his rights made it clear that he understood the warnings and knew how to exercise his right. In the case at bar the petitioner on two occasions had been advised of her *Miranda* rights and had signed waivers. She stated that she wanted an attorney on one occasion and all questioning ceased. By making such a demand, and by noting the results of her demand, petitioner was well aware that she would not

be questioned without assistance of counsel if she did not knowingly and voluntarily consent thereto.

Petitioner now alleges that the police officers suppressed evidence by failing to state until this time that she had ever requested the assistance of counsel and that as a result of her demand all questioning ended. However, Petitioner is the one who made the demand for an attorney. There can be no suppression of statements which Petitioner made. Her acts were within her own knowledge.

As regards Petitioner's accompanying the officers to the reservoir on December 28, it is readily apparent that this was a voluntary act on her part. She was twice told she did not have to go. (D.C. Tr. 215, 268, 269, 284 2nd Tr. 297). She testified at the hearing that she was told she did not have to go. (D.C. Tr. 182). There is not the vaguest hint in any record before this Court that her actions on the 28th were coerced or induced by pressure from the officers. On this point *Miranda* is most explicit:

> Volunteered statements of *any kind* are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. (384 U.S. at 478).

Upon a consideration of the circumstances attendant the making of the subject statements, this Court, the United States Court of Appeals for the Fifth Circuit, the United States District Court and the Mississippi Supreme Court have all determined that the Petitioner knowingly, intelligently and voluntarily waived her rights under *Miranda* after having received the appropriate warnings. At no time has there been any evidence that the rights of this Petitioner were violated

or infringed upon in any manner nor does the instant Petition disclose anything to the contrary.

CONCLUSION

Respondent respectfully submits that the Petitioner was very much aware of her *Miranda* rights which she elected to waive before making her statement. The Petitioner's circumstances pose no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the petition for Writ of Certiorari should in all justice be denied as being without merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen Gilfoy, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to F. Lee Bailey, Esquire, One Center Plaza, Boston, Massachusetts 02108, Mark J. Kadish, Esquire, Edward T. M. Garland, Garland, Nuckolls & Kadish,

P.C., 1012 Candler Building, Atlanta, Georgia 30303 and Harry Kelley, Esquire, 215 Barnett Building, Jackson, Mississippi 39201.

This, the 1st day of April, A. D., 1976.

KAREN GILFOY
Assistant Attorney General